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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 44568-9-II

(Lewis County Superior Court No. 10-2-01546-7)

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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JEROME C. HURLEY and BESSIE M. HURLEY, et al.,

*Appellants,*

vs.

CAMPBELL MENASHA, LLC, et al.,

*Respondents.*

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**RESPONDENT'S BRIEF**

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## I. NATURE OF THE CASE

In February, 2000, Defendant Menasha Forest Products Corporation<sup>1</sup> researched, prepared and submitted to the Department of Natural Resources a Forest Practices Application (“FPA”) requesting permission to log a 118 acre parcel of property it owned in Glenoma, Washington. Menasha adhered completely to state regulatory requirements in preparing the FPA. It provided water and wetlands information, road construction and logging method information, as well as details and maps describing topography, landing locations, reforestation methods, and areas that would not be logged in accordance with applicable logging prescriptions. Menasha’s FPA was thoroughly reviewed and approved by the Department of Natural Resources.

Logging was completed in 2001 and the harvested trees were replaced three to one. On January 7, 2009, nearly 8 years later, a combination of severe rain and snowstorms caused landslides throughout Western Washington, closing Interstate 5 near Chehalis. Three separate landslides occurred on the mountainside above the Plaintiffs’ residential

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<sup>1</sup> At the time of the 2009 slide the Martin Road logging unit was owned by Menasha Forest Products Corporation. The Campbell Group formed Campbell Menasha, LLC in 2007 to purchase Menasha Forest Products Corporation, and it subsequently managed the property on behalf of the LLC. The legal owner of the property is still Menasha Forest Products Corporation. Plaintiffs stipulated to dismissal of the Campbell Group prior to trial, Campbell Menasha LLC and Menasha are hereinafter referred to as “Menasha.”

properties, including some Plaintiffs claim originated in Menasha's logging unit (the "Martin Road slide").

Plaintiffs contend this state-approved logging unit was located on a "steep and unstable slope" in a "rain on snow zone" directly above "residential areas," and that logging such property is an "ultra-hazardous activity" for which Menasha should be strictly liable. Plaintiffs have no evidence establishing that Menasha's methods were negligent, or in violation of the FPA, state regulations, industry standards or applicable logging prescriptions. Indeed, Plaintiffs tried their negligence claim to a jury of twelve, unsuccessfully. In approving Menasha's FPA, the Department of Natural Resources categorized the Martin Road logging unit as "Class III" and not "Class IV-Special," which would have necessitated expert analysis by a geotechnical engineer or hydrologist. The Department of Natural Resources did not impose these obligations on Menasha.

Timber is a valuable resource and a vital industry to Washington State. Much of Washington's timberland is located on mountainsides where it snows and rains, and a great deal of developed property is located in areas below these mountains. There is no precedent in Washington, or any other state, declaring logging an "ultra-hazardous activity" subject to strict liability, even logging on a hillside in a rain-on-snow zone above

private property. Plaintiffs' issue is clearly with the logging industry itself, and they should take their grievances to the legislature rather than using the court as a vehicle to saddle logging companies with strict liability standards based on disputed science, insufficient causal evidence, and a putative obligation to override the Department of Natural Resources.

## **II. ASSIGNMENTS OF ERROR**

Menasha does not assign error to the trial court's Order granting summary judgment dismissal of Plaintiffs' strict liability claim, or to its Order dismissing Plaintiffs' nuisance and trespass claims. CP 1231-1238, CP 1340-1345.

## **III. STATEMENT OF THE ISSUES**

Menasha submits the following Statement of the Issues which more appropriately reflects the questions before this court:

1. Did the trial court correctly determine that logging is not an "ultra-hazardous activity" subject to strict liability?
2. Did the trial court correctly determine Plaintiffs' nuisance claim was improperly pleaded, duplicative of its negligence claim and subject to summary judgment dismissal?
3. Did the trial court correctly determine Plaintiffs' trespass claim was improperly pleaded, duplicative of its negligence claim and subject to summary judgment dismissal?
4. Are Plaintiffs' purported nuisance and trespass claims barred by the jury's determination that Menasha breached no duty?

#### IV. STATEMENT OF THE CASE

On January 7, 2009, a combination of rain and snowstorms caused numerous landslides throughout the Puget Sound region. This lawsuit arises out of three such slides that occurred in Glenoma, Washington, which Plaintiffs contend originated in separate logging units located on the mountainside above their properties. CP 754-777. Menasha logged one of these units in 2001 pursuant to an approved logging permit from the Department of Natural Resources. The slide at issue involving the unit where Menasha conducted work is known as the “Martin Road Slide.” CP 759.

##### **A. THE DEPARTMENT OF NATURAL RESOURCES DID NOT CATEGORIZE THE MARTIN ROAD FPA AS A “CLASS IV” APPLICATION REQUIRING A SPECIAL ASSESSMENT**

Menasha’s former forester, Teresa Loo, submitted a Forest Practices Application (“FPA” No. 2506530) to the Forest Practices Division of the Department of Natural Resources on February 22, 2000, seeking a permit to log a 118 acre parcel of property owned by Menasha in Glenoma, Washington. CP 779-822. The application sought construction of 800 feet of new road and harvesting of 116 acres of timber. *Id.* On April 24, 2000, Ms. Loo submitted an addendum to the FPA:

Menasha Corporation proposes to conduct routine road maintenance (ditch, reshape and install relief culverts)

along approximately 1565 feet of existing road in the NW ¼ of the NW ¼ of Section 12 (see enclosed map). Menasha Corporation also proposes to hand tailhold cables over Type 5 water. No yarding will take place through or over the riparian buffer of this Type 5 water. In addition, special care will be taken to ensure no logging debris enter the water and that the integrity of the riparian buffer is not compromised.

CP 821-822. Menasha's addendum proposal was approved on May 11, 2000, by Department of Natural Resources ("DNR") Forest Practices Forester Richard Peake. CP 820. On June 16, 2000, Ms. Loo submitted a second addendum stating:

Menasha Corporation proposes to change the location of landings and new road construction in the N ½ of the NW ¼ of Section 2 (see attached map). The new proposed road is approximately 1,050 feet in length. The total length of endhaul construction is 200 feet. The steepest slope is 55%.

These operations are located within the Kosmos WAU. All planned activities are in accordance with the watershed analysis prescriptions. The proposed road constructions and landings are not located within the two Mass Wasting Management Units that occur within the unit boundary.

CP 789-792. DNR Forester Richard Peake approved the addendum on July 11, 2000, with no additional conditions. CP 788.

Menasha's application was initially approved by the Department of Natural Resources on March 6, 2000. CP 779. It was "classified" as "Class III-14." *Id.* Under the regulations in place at the time, Class III

applications did not require additional geotechnical review by a qualified expert for the purpose of analyzing the site for potentially unstable slopes. CP 824-826, Appendix 1. The Department of Natural Resources categorized applications to log potentially unstable slopes as “Class IV,” which required an environmental checklist in compliance with the State Environmental Policy Act (SEPA):

**RCW 76.09.050 Rules establishing classes of forest practices—*applications for classes of forest practices—Approval or disapproval—Notifications—Procedures—Appeals—Waiver.***

(1) The board shall establish by rule which forest practices shall be included within each of the following classes:

....

**Class III:** Forest practices other than those contained in Class I, II, or IV. A Class III application must be approved or disapproved by the department within thirty calendar days from the date the department receives the application. However, the applicant may not begin work on that forest practice until all forest practice fees required under RCW 76.09.065 have been received by the department.

**Class IV:** Forest practices other than those contained in Class I or II:

- (a) On lands platted after January 1, 1960, as provided in Chapter 58.17 RCW,
- (b) On lands that have or are being converted to another use,

(c) On lands which, pursuant to RCW 76.09.070 as now hereafter amended, are not to be reforested because of the likelihood of future conversion to urban development,

(d) Except those lands involving timber harvesting or road construction on lands that are contained within “urban growth areas,” designated pursuant to chapter 36.70A RCW, where the forest landowner provides:

(i) A written statement of intent signed by the forest landowner not to convert to a use other than commercial forest product operations for ten years, accompanied by either a written forest management plan acceptable to the department or documentation that the land is enrolled under the provisions of chapter 84.33 or 84.34 RCW; or

(ii) A conversion option harvest plan approved by the local governmental entity and submitted to the department as part of the application; and/or

(e) Which have a potential for a substantial impact on the environment and therefore require an evaluation by the department as to whether or not a detailed statement must be prepared pursuant to the state environmental policy act, chapter 43.21C RCW. Such evaluation shall be made within ten days from the date the department receives the application: PROVIDED, That nothing herein shall be construed to prevent any local or regional governmental entity from determining that a detailed statement must be prepared for an action pursuant to a Class IV forest practice taken by that governmental entity concerning the land on which forest practices will be conducted. A Class IV application must be approved or disapproved by the department within thirty calendar days from the date the department receives the application, unless the

department determines that a detailed statement must be made, in which case the application must be approved or disapproved by the department within sixty calendar days from the date the department receives the application, unless the commissioner of public lands, through the promulgation of a formal order, determines that the process cannot be completed within such period. However, the applicant may not begin work on that forest practice until all forest practice fees required under RCW 76.09.065 have been received by the department.

**Forest practices under Classes I, II, and III are exempt from the requirements for preparation of a detailed statement under the state environmental policy act.**

...

CP 824-826 (emphasis added), Appendix 1. A special assessment of the Martin Road logging unit was not required because Menasha's FPA was categorized as "Class III."

New "emergency" DNR regulations went into effect on March 20, 2000, two weeks after Menasha's FPA was approved. These rules authorized, *but did not require*, Mr. Peake to call for a special "SEPA" assessment for non-Class IV applications under WAC 222-10-010. CP 828; Appendix 2. Mr. Peake did not ask Menasha to conduct a special assessment of the site under this new rule, however, even when approving Menasha's subsequent two addendums to the FPA later that year. CP 788, 820. Plaintiffs do not dispute that a special geotechnical analysis **was not required** by Forest Practices rules in place at the time.

**B. THE KOSMOS WATERSHED ANALYSIS DID NOT REQUIRE MENASHA TO CONDUCT AN INDEPENDENT EXPERT ANALYSIS OF THE MARTIN ROAD LOGGING UNIT**

Menasha's unit was located in an area that had previously been analyzed for "mass wasting" or landslide potential, under the 1996 Kosmos Watershed Analysis. CP 781, 784, 832-886. Menasha's FPA proactively disclosed two "mass wasting map unit areas," or "MWMU #1" areas, which were identified by Menasha's forester on the ground, Teresa Loo. CP 781, 784, and 805. The Kosmos "prescriptions" for "MWMU 1" areas are as follows:

- No harvest in high mass wasting hazard units (MWMU #1 and #2). This is the preferred prescription.
- Harvesting may occur within portions of these units if a finer-scale (secondary) slope stability assessment delineates areas that do not exhibit the mass wasting characteristics described above...

CP 837. Forester Teresa Loo indicated on Menasha's FPA that the two MWMU #1 areas in its unit would **not** be logged. CP 781, 784, and 805.

Plaintiffs suggest Menasha failed to "field identify" other potential MWMU #1 areas that were present with the harvest unit but not shown on the Kosmos maps. On summary judgment Plaintiffs offered no actual evidence that there *were actually other MWMU #1 areas that were not*

*field identified and that were present and should not have been logged.*

Subsection 3.5.1 of the Kosmos analysis discusses “field verification:”

### 3.5.1 Field Verification

...In many areas it is not possible to locate accurately the position of certain landform boundaries on topographic maps or on aerial photographs. Therefore, actual boundaries between mapping units in any specific location in the study area need to be verified (and possibly corrected) during field use of the slope stability map for purposes of harvest unit layout and road design by foresters or road engineers...

CP 885. The “prescriptions” section of the Kosmos analysis similarly includes a “Guideline for Implementing Mass Wasting Prescriptions,” which states:

Implementations of prescriptions that apply to mass wasting hazards in the Kosmos WAU require the identification of mass wasting map unit (MWMU) boundaries in the field. The identification and verification of MWMU boundaries often can be accomplished by foresters and other resource managers using the descriptions of map units in Table 3-2 and the slope stability and slope hazard maps in Figure 3-5 and 3-9 respectively...the descriptions of map units as defined, in general, by slope gradient and slope form should be used as a guide to locate the boundaries of map units in the field prior to layout of proposed harvest or road construction activities.

CP 833-34.

Menasha complied with the directives of the Kosmos Watershed Analysis. Prior to submitting the FPA and creating the Forest Practices

Maps therein, Menasha forester Teresa Loo “walked the site” not once, but multiple times. CP 896-97, 899. It was her practice to “go everywhere that needed to be flagged.” CP 897. This included walking each of the three streams in the unit “that are indicated in the FPA as requiring buffers,” as well as observation and confirmation of logging road and landing locations. CP 897, 898-99. It also included review of the Kosmos prescriptions applicable to the site, identification of mapped “mass wasting map unit areas,” and location of those areas on the ground. CP 905, 908.

Ms. Loo “laid out” the harvest unit on behalf of Menasha. CP 900-901. This included flagging the perimeter of the unit as well as the “resources that needed protection.” CP 888-89, 901. It took Ms. Loo several days to complete the “lay out.” CP 890, 898. As part of her work she would “use her knowledge” to “look for basically any type of issue that might come up.” CP 893. This included potentially unstable slopes:

- Q. So what would be the potential sources of information regarding an unstable slope situation? How would you potentially learn about an unstable slope on a parcel you were examining?
- A. If there was an existing slide. If there was evidence of a past slide. If there were no conifer stumps.
- Q. So are those things you would observe when you went out there and did the site visit?

A. When I did what site visit?

Q. You said, for instance, if there were no slides. How would you determine whether there had been slides?

A. Any visible evidence. If I'm walking through a unit and I clearly see there's a slide, it's a big red flag.

*Id.*

Despite spending days on the ground, forester Teresa Loo identified no “red flags” at the Martin Road unit, determining slope stability was not an issue at the site. CP 892, 903-904. In fact, she took extra care to plan and lay out the unit so logs would *not* need to be transported through buffers established around streams. CP 907. She also believed the Department of Natural Resources would identify any issues or concerns during its review of the FPA and deny it or impose conditions accordingly. CP 893-94, 910.

**C. THERE IS NO EVIDENCE MENASHA CONDUCTED ITS LOGGING WORK IMPROPERLY**

Once the FPA was approved Menasha forester Teresa Loo turned the project over to Menasha’s contract administrator, George Suter. CP 901. Mr. Suter arranged for contractors to construct the roads and to conduct the logging operations. CP 902, 913-14. Mr. Suter supervised the contractors to ensure they complied with their contracts and with the FPA. CP 906, 913. His involvement was quite extensive:

...after I get the map and the photos, I would go out and walk the unit to get myself familiar with anything that may stand out within the unit, make sure everything looks - looks okay to me.

Q Right.

A For I can relay that to whoever the potential operator is....So you go over the map and contract with them, not necessarily the contract so to speak as the FPA and what's involved, unit of the map to show them - or map of the unit. Excuse me. And then if you had an aerial, you can kind of show them, you know, "Watch out for this" or whatever so . . . Those are kind of the basic steps to start with.

CP 913-914. (emphasis added). He did not observe anything suggesting "possible land movement" at the site. CP 652.

George Suter closely monitored and supervised the logging contractor, B&M, "to make sure that everything is being done according to the contract and the FPA as far as yarding goes." CP 920-921. He specifically ensured the 25 foot buffers around streams were protected. CP 928. B&M owner Brandon Smith recalls Mr. Suter checking on the operations constantly to ensure B&M's compliance with the contract and FPA. CP 932. He recalls the site being meticulously flagged out into "no cut zones," which B&M strictly adhered to. CP 933-34. Mr. Suter conducted a "final audit" at the conclusion of the logging work, walking the unit to ensure all boundaries were maintained, slash was "taken care of," roads were "cleaned up" and "drainages open." CP 922. After that,

Menasha foresters visited the site frequently during replanting and for several years after to monitor the progress of regrowth. CP 923.

Mr. Suter testified unequivocally that he had no recollection of **any** instance where Menasha failed to follow industry standards, the FPA, or applicable forest practice regulations established by the Department of Natural Resources. In fact, after a 6 week trial on the issue the jury agreed. CP 1536.

**D. PLAINTIFFS HAVE NO EVIDENCE THAT MENASHA'S LOGGING ACTIVITIES PROXIMATELY CAUSED THE SLIDES**

Plaintiffs' strict liability theory depends on the idea that Menasha should have divined that the Martin Road logging unit was some sort of "ultra-hazardous, unstable slope," even though neither the analyzing foresters nor the Department of Natural Resources categorized it as such. The trial court rejected such a vague application of strict liability and this court should too. The existence of studies suggesting logging in general may decrease slope stability does not mean that is what *actually occurred* at the Martin Road logging unit so as to create an actionable claim against Menasha. Indeed, the science behind Plaintiffs' "loss of root cohesion" theory is anything but "established," especially at the location of the logging unit in question:

Root cohesion is a factor in shallow slides on the order of about three feet deep because tree roots in the Cascade Range average 24 to 36 inches in depth according to studies the plaintiffs' expert relies upon. The slides I observed at the unit above Martin Road were much deeper than 36 inches. In some cases, the slides were as deep as 10-20 feet, beyond the reach of any tree roots.

CP 502. In fact, one of the authors of the very studies Plaintiffs rely on notes "evapo-transpiration is not significant in the winter or during one short-term event," like the event in January, 2009. *Id.*

Plaintiffs' brief is full of unsupported, self-serving assertions designed to distract the court from the lack of evidence on proximate cause. Plaintiffs claim that "dams formed as a result of the landslides sliding into the stream channels bringing with them logs, logging debris, uprooted trees that had been left in the stream buffers, boulders, rocks, soil and other debris." *Plaintiff's Brief at p. 10.* The problem is, Plaintiffs' experts acknowledged they had **never set foot on the harvest unit to determine whether or not there really was** "logging debris" left onsite that formed the alleged "logging jams" Plaintiffs claim caused the flooding in question. CP 967, 971. Plaintiffs' experts were careful to tiptoe around this issue in their declarations, stating only that the dams they allege occurred were "formed by debris and other material from the clearcut slopes." CP 108. Neither expert had anything specific to say about how Menasha performed its logging work, or what debris may have

been left on the site, if any. CP 966, 975. In fact, Plaintiffs' expert Chris Brummer conceded the debris dams were created by the landslides themselves, not debris left behind or any activities that took place during logging operations. CP 660.

Mr. Brummer is not a forester or an expert in forest practices. He did not consider himself qualified to determine whether Menasha complied with the applicable FPA or industry standards, and he did not analyze whether the slide at issue in this case would have occurred whether the property was forested or not. CP 668, 676-677, 968. Plaintiffs' other expert, Paul Kennard, agreed Menasha complied with the "letter" of the FPA, but he *did not know* whose responsibility it was to "field identify" potential high-hazard sites, and he certainly is not qualified to address whether state regulations adequately address the "risk" associated with logging hill slopes. CP 972-974, 978.<sup>2</sup> Indeed, Plaintiffs advanced no evidence on summary judgment that the slide happened because of *something specific* about Menasha's logging operations.

Instead, Plaintiffs offered misleading and inapplicable evidence with no connection to Glenoma, Menasha's property or its logging work to

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<sup>2</sup> The portion of Kennard's Declaration addressing logging standards was struck by the trial court because he was not qualified to give opinions about a logger's duty of care. CP 1493-1496.

“fill in the gaps.” For example, the photo on page 1 is an image of muddy floodwater, not “landslide debris.” *Plaintiffs’ brief at pp. 1, 7-8.* Plaintiffs make much of their argument that logging roads have an “unavoidable, destabilizing effect on steep slopes,” but neither of their experts opined that improperly constructed logging roads caused the landslides originating on Menasha’s property. CP 667, 669. Indeed, the photo on page 8 of Plaintiffs’ brief depicts a logging road *not actually* located in the Martin Road unit with a failure occurring on the slope *above* the road, not below or because of it. CP 112-113. Plaintiffs quote an excerpt from the deposition of defense expert Ed Heavey, *a geologist*, in which Plaintiffs’ counsel asked him a series of questions about various *hydrology studies*, an issue outside his expertise and about which he offered no opinions at trial. *Plaintiffs’ brief at p. 5*, CP 1189-1190.

Plaintiffs offer this “evidence” to distract the Court from the fact that qualified defense experts opined, to a reasonable degree of scientific certainty, that it was the extreme amount of water generated by combined rain and snow melt that caused the slides at issue, not Menasha’s logging or even the fact of logging. CP 502.

**E. EVIDENCE ESTABLISHES THE SLIDE WAS CAUSED BY AN UNUSUALLY MASSIVE RAINSTORM EVENT, NOT THE METHOD OR MANNER OF MENASHA’S LOGGING**

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Plaintiffs' real claim is that the harvest units in question should not have been logged in the first place because logging hillsides in general increases the risk of landslides. CP 763. However, Plaintiffs must prove a causal relationship between Menasha's **specific actions** and their claimed damages in order to impose liability, even strict liability. *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961); *Carlos v. Cain*, 4 Wn.App. 475, 477, 481 P.2d 945 (1971).<sup>3</sup> Plaintiffs' one-sided presentation of some studies addressing the impact of logging on root strength *in general* is not a sound basis on which to construct new law on strict liability.

Plaintiffs fail to contend with expert evidence establishing that the slides and debris flows that damaged their properties **would have occurred regardless of whether the hillside was logged simply because of the overwhelming amount of water saturating the soil from an extraordinary and exceptional storm event**. CP 497-503, 964-969. The rainstorms that occurred between January 6, 2009 and January 9, 2008

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<sup>3</sup> Expert testimony is required to establish causation when an injury involves scientific factors that would compel an ordinary lay person to speculate or engage in conjecture in making a finding. *Bruns v. PACCAR, Inc.*, 77 Wn.App. 201, 214, 890 P.2d 469 (1995). The required expert testimony must provide proof that Menasha "more probably than not" caused the Plaintiff's claimed injuries "to a reasonable degree of certainty." 5B *Wash. Prac., Evidence Law and Practice* § 702.30 (5th ed.). "Less certain evidence, such as may, might, could or possibly, does not provide enough guidance to the jury to remove the decision making process from speculation and conjecture." *Bruns*, 77 Wn.App. at 215. Here, the question of causation depends on considerations of geotechnical analysis, engineering, hydrology, and logging expertise that are outside the knowledge of an average layperson. Plaintiffs must establish expert testimony linking their damages to something Menasha allegedly did in logging the Martin Road unit.

were unprecedented. CP 499. Nearly five inches of rain fell on January 7, 2009, alone, with two-day totals as high as 10-15 inches. CP 499, 1032. Rivers throughout Western Washington reached record flood levels, and nearby Tilton River exhibited the highest estimated discharge on record. *Id.* In addition, higher than average temperatures caused more than 12.5 inches of snow to melt, leading to ground saturation. CP 500. As a result, *over 1500* landslides in Western Washington were attributed to the storm, concentrated in areas that received *the most precipitation*, not the most logging. *Id.*

...Landslides occurred in areas that had recently been logged, in areas of young forests, and in areas of mature forest which haven't been logged for many years. Logging in and of itself clearly is not the answer. In my opinion, flooding/earth movement event would have occurred here whether or not the property had been logged 9 years prior...

...

Some landslides occurred in places where a thin layer of soil covered the bedrock surface where no trees grew and no logging was done. It also appears that the depth of soil that moved was in some places is much greater than the depth of tree roots. The mechanism triggering the earth movement was pore pressure build up in the ground caused by water saturating the ground. Failure actually occurred near the soil/rock interface. In my opinion, the amount of water that infiltrated into the ground from the rain and snow melt was of such volume that the landslides would have occurred whether large trees were there or not. It is true that a tree canopy can result in less water concentrated on the ground and in the ground but in this case, the amount of that water entering the ground was so great that the trees would not have prevented what occurred. This

same thing occurred in many areas where the trees had not been harvested.

CP 967, 968-969.

In other words, the presence of trees and “tree roots” would have made no difference in light of the deluge introduced by this unprecedented storm.<sup>4</sup> Plaintiffs’ treatise on the hazards of mountain logging must be disregarded in the absence of any actual evidence of a causal connection to *this logging unit*. Plaintiffs’ experts admit studies they rely on were intended for *regional* application; they do not address the unique topography and geology of the Glenoma region. CP 498. Hypothetical suggestions, leading questions, misrepresented photos and statistical studies do not substitute for actual evidence on proximate cause. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 85, 51 P.3d 793 (2002).<sup>5</sup>

Subjecting timber owners to nebulous strict liability standards pursuant to unclear criteria is unrealistic and would have a chilling effect on the logging industry. Washington State responded to the question of risk by imposing logging regulations and prescriptions that are re-

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<sup>4</sup> This is further supported by the fact that the Martin Road logging unit had been harvested at least four times in the last 80 years. CP 966. In 2000 – 2001 it was logged and replanted. In the last century, there were no known flood/earth movement events like the one that occurred in January 2009, despite the fact that many major rain on snow events occurred. *Id.*

<sup>5</sup> Disapproved of on other grounds in *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009).

examined and updated regularly. Menasha followed precisely the regulations and prescriptions in place at the time the Martin Road unit was logged and a jury found it breached no duty owed to the Plaintiffs, however remote. What Plaintiffs are really intent on is a policy argument about clear-cutting in general. If Plaintiffs consider the risk to be unacceptable, the correct forum for their complaint is the legislature, not the court.

## V. PROCEDURAL HISTORY

Plaintiffs' filed their initial Complaint on November 4, 2010. CP 1-12. On July 28, 2011 they filed an Amended Complaint. CP 13-26. On May 4, 2012, Plaintiffs filed their second Motion for Partial Summary Judgment on Strict Liability, Causation, and Breach of Duty. CP 285-327. Plaintiffs' first attempt to obtain a ruling on this issue was on a "Cross Motion" submitted in response to Defendant Don Zepp Logging's Motion for Summary Judgment. CP 579. Judge Richard Brosey denied Plaintiffs' motion because they had not plead that logging was an ultra-hazardous activity, and because raising the claim for the first time in a summary judgment opposition did not afford Defendants sufficient time to respond. *Id.* On June 5, 2012, Lewis County Superior Court Judge Nelson E. Hunt denied Plaintiffs' second Motion for Partial Summary Judgment on Strict

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Liability, and denied Plaintiff's concurrent Motion to Amend to correct its pleading. CP 1231-1238.

On June 8, 2012, Menasha filed a Motion for Partial Summary Judgment re: Plaintiffs' Claims for Specified Damages, Nuisance and Trespass. CP 1239-1261. Defendants Pope Resources, Port Blakely-Island Timber, and Don Zepp Logging joined in Menasha's motion. CP 1284-1286, 1281-1283, and 1277-1280. After oral argument, Judge Hunt dismissed Plaintiffs' claims for *nuisance* and *trespass*. CP 1340-1345. Don Zepp's separate Motion for Summary Judgment was granted on October 5, 2012. CP 1488-1492.

Plaintiffs subsequently tested their negligence claim in a six-week jury trial on the Martin Road slide against Menasha.<sup>6</sup> Judge Hunt had the opportunity to revisit and reverse his summary judgment rulings at the close of evidence, but he declined to do so, rejecting Plaintiffs' proffered jury instruction on strict liability. On December 14, 2012, the jury returned a defense verdict:

We the jury, answer the questions submitted by the court as follows:

LIABILITY

A. Was the defendant negligent?

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<sup>6</sup> The trial court bifurcated Plaintiffs' claims related to the Martin Road Slides from their claims related to the Lunch Creek and Rainey Creek slides for the purposes of trial.

ANSWER: NO. (Write “yes” or “no”)

CP 1536.

## VI. ARGUMENT

### A. THE STANDARD OF REVIEW IS DE NOVO

An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). The Court must examine the entire record.

An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party... and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

*Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). CR 56(c) provides for judgment if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A cause of action must be dismissed if the defendant

can demonstrate that the plaintiff is unable to establish a critical element of its claim. *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992 (1988). All facts and reasonable inferences are considered most favorably to the nonmoving party. *Craig v. Washington Trust Bank*, 94 Wn.App. 820, 824, 976 P.2d 126 (1999). The motion should be granted if, from all the evidence, a reasonable person could reach but one conclusion. *Folsom*, 135 Wn.2d at 663.

Plaintiffs advanced two theories of “strict liability” at the trial court level. The first was that “clearcut logging on steep, unstable slopes in and near the rain-on-snow zone directly above residential properties” constitutes an “abnormally dangerous activity.” The second was that clearcutting the Martin Road logging unit “resulted in dam (sic) blocking the streams, which dams gave way causing the harm...” *Plaintiffs’ Brief at pp. 3-4*. There is no authority or precedent establishing that logging is an “abnormally dangerous activity” and Plaintiffs have no evidence supporting their second theory, which is why they abandon it on appeal. In addition, the jury determined Menasha was not negligent and Plaintiff cannot now resurrect their tort theories of nuisance and trespass. This court should uphold the trial court’s rejection of Plaintiffs’ strict liability, nuisance and trespass claims as a matter of law.

**B. PLAINTIFFS' STRICT LIABILITY CLAIM FAILS AS A MATTER OF LAW**

1. Plaintiffs cannot narrowly define an activity as “abnormally dangerous.”

Plaintiffs' Second Amended Complaint asserts that:

Defendants are strictly liable to plaintiffs for damages resulting from their activities which obstructed creeks. Those obstructions then gave way, flooding downstream property.

CP 765. Relying on this, Plaintiffs argue that clearcut logging on “steep, unstable slopes,” is an “abnormally dangerous” or an “ultra-hazardous” activity imposing strict liability standards on logging companies. There is no authority for this unprecedented claim in Washington or any other state.

Washington has long since recognized the doctrine of “strict liability” as established in the Restatement 2<sup>nd</sup> of Torts § 519 and § 520. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6, 810 P.2d 917, *amended*, 117 Wn.2d 1, 817 P.2d 1359 (1991). Under § 519:

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.
- (2) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

Restatement 2<sup>nd</sup> of Torts § 519 (1977). Determination of whether an activity is an “abnormally dangerous activity” **is a question of law**. *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 500, 687 P.2d 212 (1984); *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 567 P.2d 218 (1977).

The Restatement 2<sup>nd</sup> of Torts § 520 lists six factors for the Court to consider in determining whether an activity is “abnormally dangerous:”

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement 2<sup>nd</sup> of Torts § 520 (1977). As Plaintiffs recognize, “any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability.” *Klein*, 117 Wn.2d at 7, quoting Restatement (Second) of Torts § 520, comment f (1977).

The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.

*Id.*

Narrowly defining the “activity” subjected to analysis under § 520 is improper. “An activity is abnormally dangerous if it is ‘dangerous in its normal or nondefective state.’” *Arlington Forest Assoc. v. Exxon Corp.*, 774 F.Supp. 387, 392 (E.D. Va. 1991), quoting *Fallon v. Indian Trail School*, 500 N.E.2d 101, 103 (Ill.App.Ct. 1986). “For strict liability purposes, the danger cannot be predicated on mere casual or collateral negligence of others with respect to the [the activity] under the particular circumstances.” *Id.*, quoting *Fallon*, 500 N.E.2d at 103. Conduct that in and of itself is not *abnormally dangerous* does not become so simply because it can be performed negligently in defined circumstances. *See Doe v. Johnson*, 817 F.Supp. 1832, 1385 (1993), in which the plaintiff argued the defendant was strictly liable for engaging in unprotected sexual activity with her when he had HIV. The Court ruled that strict liability does not apply to sexual activity, and conduct that is not abnormally dangerous does not become so simply because the defendant engaged in that activity negligently. *Id.* at 1399.

Here, if plaintiffs' allegations that defendant engaged in unprotected sexual contact with Ms. Doe while knowing he was infected with the HIV virus are true, then defendant's actions were unquestionably dangerous and hazardous-in-fact, like driving an automobile drunk or without a seatbelt (but driving an automobile is not "inherently dangerous"). The fact that defendant made sexual activity dangerous and hazardous does not mean that sexual activity is, in and of itself, an inherently or abnormally dangerous activity.

*Id.*<sup>7</sup>

The same reasoning can be applied to this case. Plaintiffs do not argue that *logging* itself is an *abnormally dangerous* activity, but that logging an allegedly "steep unstable slope in a 'rain-on-snow' zone above residential properties" is *abnormally dangerous*. This is the same thing as arguing Menasha negligently chose to log a unit that should not have been logged. Plaintiffs' real claim is for plain negligence, and a jury already resolved that issue after a six week trial.

Plaintiffs' artificial attempt to narrowly define the activity in question "would, in effect, enable plaintiffs to invoke strict liability for all negligently-conducted activity." *Arlington Forest Assoc.*, 774 F.Supp at 392.

...Performing a dangerous activity in a negligent manner cannot be made safe except by ceasing to behave

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<sup>7</sup> See also *Jackson v. Hearn Bros. ' Inc.*, 212 A.2d 726, 727 (Del. 1965) (use of shopping cart is not itself an abnormally dangerous activity; only when used improperly is any hazard created which is "simply another way of saying that liability depends upon the usual rules of negligence.") *Id.*

negligently. Any plaintiff in a negligence action could simply characterize the offending behavior as incapable of being safely performed even with due care, thus bringing it within the scope of strict liability. For example, the activity of “driving a car” can be made sufficiently safe by the exercise of reasonable care. But “driving a car at an excessive rate of speed” cannot be made safe except by ceasing to drive too fast. Clearly this approach would extend the reaches of strict liability far beyond the bounds of the law and of common sense.

*Id.* at 392-393. For this reason no Court in Washington or any other jurisdiction has found logging to be an abnormally dangerous activity subject to strict liability. Plaintiffs’ “slippery slope” argument that it **can be** abnormally dangerous in prescribed circumstances should be rejected.

2. Plaintiffs have failed to establish that logging is “abnormally dangerous” under the six-part test in the Restatement 2<sup>nd</sup> of Torts § 520.

Plaintiffs painstakingly go through each factor under § 520, comparing this case to *Klein v. Pyrodyne*, supra, *Langan v. Valicopters, Inc.*, supra, and *Vern J. Oja & Assoc. v. Washington Park Towers, Inc.*, 15 Wn. App. 356, 549 P.2d 63 (1976), *affirmed* 89 Wn.2d 72, 569 P.2d 1141 (1977). For the reasons stated below, this case, and the particular circumstances of Menasha, is more akin to the findings in *Martinez v. Grant County Public Utility Dist. No. 2*, 70 Wn. App. 134, 851 P.2d 1248 (1993) (courts will not impose strict liability for electrical transmission lines out of “societal necessity”), *Hernandez v. George E. Failing Co.*, 28

Wn. App. 548, 624 P.2d 749 (1981) (electrical lines involve a “high degree of risk of harm”, but “it may be economically impractical to insulate all overhead power lines, and that such lines are ubiquitous in rural communities nationwide”), *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 102 Wn.2d 495, 501-502, 687 P.2d 212 (1984) (“Some degree of risk of natural gas pipeline leaks will always be present. This does not mean, however, that the “high degree of risk” with which section 520 is concerned cannot be eliminated by the use of reasonable care with regard to the dangerous character of the commodity”), and *Crosby v. Cox Aircraft Co. of Washington*, 109 Wn.2d 581, 746 P.2d 1198 (1987) (no strict liability for ground damage caused by aircraft).

*(a) Plaintiffs misapply the “risk of harm” test under parts (a)-(c) of the Restatement 2<sup>nd</sup> of Torts § 520.*

In applying strict liability, the Court must ask “whether, through the exercise of ordinary care, the risk inherent in an activity can be reduced to a point where it can be no longer characterized as a ‘high degree of risk.’” *New Meadows*, 102 Wn.2d at 501. If the risk can be so reduced, strict liability is not applied. *Crosby’s* analysis of the § 520 factors provides a guideline for this test. After all, there is no doubt that

the “risk of harm” created by the danger of an aircraft crashing to the ground as contemplated in that case is great, however:

Factor (b) speaks to the gravity of the harm—that is, in the unlikely event that an airplane accident occurs, whether there is a “likelihood that the [resulting harm] will be great.” It is apparent that this possibility is present. However, this must be further evaluated in light of factor (c), which speaks of the “inability to eliminate the risk by the exercise of reasonable care.” Given the extensive governmental regulation of aviation, see generally 14 CFR Ch. I (1978) (Federal Aviation Administration regulations), and the continuing technological improvements in aircraft manufacture, maintenance and operation, we conclude that **the overall risk of serious injury from ground damage can be sufficiently reduced by the exercise of due care.** Finally, factors (d), (e), and (f) do not favor the imposition of strict liability. Aviation is an **activity of “common usage”, it is appropriately conducted over populated areas, and its value to the community outweighs its dangerous attributes. Indeed, aviation is an integral part of modern society.**

The causes of aircraft accidents are legion and can come from a **myriad of sources.** Every aircraft that flies is at risk from every bird, projectile and other aircraft. Accidents may be caused by improper placement of wires or buildings or from failure to properly mark and light such obstructions. The injury to the ground dweller may have been caused by faulty engineering, construction, repair, maintenance, metal fatigue, operation or ground control. Lightning, wind shear and other acts of God may have brought about a crash. **Any listing of the causes of such accidents undoubtedly would fall short of the possibilities. In such circumstances the imposition of liability should be upon the blameworthy party who can be shown to be at fault.**

*Crosby*, 109 Wn. 2d at 587-88 (emphasis added). The analysis in *Crosby* is directly applicable to this case, where the multitude of state-wide studies, analyses, statutes, regulations and prescriptions mean that “overall risk of serious injury...can be sufficiently reduced by the exercise of due care.”<sup>8</sup> Moreover, “a myriad” of factors contributed to the slides at issue on this case, just as “a myriad” of issues can cause a plane to crash. These have gone unmentioned by Plaintiffs, including most obviously, *the weather*.

Plaintiffs rely on *Klein v. Pyrodyne*, 117 Wn.2d 1, to argue that the standard is whether the risk can be *entirely* eliminated by regulation (the “necessity for regulation demonstrates dangerousness”),<sup>9</sup> but that is not the test. *Klein* subjected public fireworks displays to strict liability, despite the fact that fireworks activities are highly regulated, but *Klein* is nothing like the case at bar. *Klein*, 117 Wn.2d at 8. The regulations considered in *Klein* were *intended* to promote public safety and prevent the very injury that occurred. In contrast, logging regulations are designed to protect *public resources* such as water quality and fish habitat. See WAC 222-22-

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<sup>8</sup> See also *New Meadows*, in which the Court found the transmission of natural gas through underground lines was not *abnormally* dangerous in part because “[g]as companies are subject to strict federal and state safety regulations.” *New Meadows*, 102 Wn.2d at 501-02.

<sup>9</sup> *Plaintiffs’ Brief* at pp. 16, 17.

010(1) (purpose of the logging industry regulations is to protect public, not private resources).

Plaintiff's reliance on *Langan v. Valicopters, Inc.* is similarly misplaced. In *Langan* the Court imposed strict liability on crop dusters who sprayed property adjacent to an organic farm after the wind carried the chemicals to the organic crop. *Langan*, 88 Wn.2d at 857. The Court cited "uncertain and uncontrollable factors" inherent in crop dusting, including the size of the chemical particles and natural atmospheric forces, to determine the risk to neighboring property was "unavoidable." *Langan* does not fit the facts of this case. Menasha was not using chemicals subject to the whims of the wind and its operations were approved and monitored by the Department of Natural Resources. Moreover, the alleged harm did not occur instantly as it did in *Langan*, (and *Klein*), but nearly a decade later after a record-setting storm generated 1500 landslides and flooding throughout half the state, many occurring in forest land that had not been logged in over 100 years. CP 498, 500.

The Plaintiffs here were not harmed by Menasha's *actual operations*, as the organic farmers were harmed by the crop dusters' *actual operations* in *Langan*. They chose to purchase properties at the base of a hill on an alluvial fan indicative of longstanding, historic natural

landslides occurring over thousands of years.<sup>10</sup> CP 500, 666. The Martin Road unit was regularly logged for nearly a century, pre-dating the construction of Plaintiffs' residences. Imposing strict liability under Plaintiffs' theory would render economically viable timberland unusable as soon as anyone builds downhill. Plaintiffs were exposed to risks that are not "inherent" in the logging industry, especially where the slides at issue originated well below the absent "tree roots" that form the basis of their "logging is inherently dangerous" argument. CP 502. "[S]trict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous." Restatement 2nd of Torts § 519(2). Here Plaintiffs have no evidence that the landslides occurred *because of Menasha's logging* rather than a giant rainstorm on a saturated hillside, and they have no evidence that the purported "risks" posed by logging cannot be appropriately addressed by applicable statutes and regulations.

In *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983, 93 S.Ct. 2275, 36 L.Ed.2d 959 (1973), cited by Plaintiffs at page 13 of their brief, strict liability was imposed on the act of hauling gasoline in commercial quantities as freight upon public highways. Even in that case, however, the Court recognized that where

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<sup>10</sup> See *Foster v. Preston Mill Co.*, 44 Wn.2d 440, 268 P.2d 645 (1954) (plaintiffs' damages did not correlate to the alleged inherent risk of harm but rather plaintiffs' own unusual use of the land.)

there is the intervention of an “outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling [the gasoline]”, the rule of strict liability **should not apply**. *Siegler*, at 460. Here there were many, many forces outside the control of Menasha that caused or contributed to the slides or debris flows at issue, and the imposition of strict liability is inappropriate.

*(b) Plaintiffs undervalue the economic importance of logging to Lewis County and Washington State under parts (d)-(f) of the Restatement 2<sup>nd</sup> of Torts § 520.*

The Restatement 2<sup>nd</sup> of Torts § 520 (d)-(f) concern whether the activity is “not a matter of common usage,” whether it is “inappropriate to the place it is carried on,” and the “extent to which its value to the community is outweighed by its dangerous attributes.” In analyzing these factors Plaintiffs seriously underestimate the utility and economic position of logging in Lewis County, and indeed the entire state.<sup>11</sup> In 2011 alone over 2.9 billion board feet of timber was harvested in Washington, including 4.11 million in Lewis County.<sup>12</sup> Washington realized close to

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<sup>11</sup> *Logging Industry in Lewis County*, <http://jtenlen.drizzlehosting.com/walewis/logging.html>, Appendix 3.

<sup>12</sup> Washington Department of Natural Resources, Washington Timber Harvest 2011, [http://www.dnr.wa.gov/Publications/obe\\_wa\\_timber\\_harvest\\_2011.pdf](http://www.dnr.wa.gov/Publications/obe_wa_timber_harvest_2011.pdf), Appendix 4 at pp. v, 17.

\$100,000,000.00 in state forest income in 2011,<sup>13</sup> and the “agricultural side of managing forest lands...by itself is worth nearly \$2 billion in gross business income annually.”<sup>14</sup>

Revenue from state timber trust lands is used to fund public schools and universities, and wood products contribute nearly \$5 billion annually to the state’s Gross Domestic Product.”<sup>15</sup> There is no question that the timber industry has enormous value to the Lewis County community and the entire state. Like aviation in *Crosby*, logging, forestry and timber products comprise an integral part of modern society, and the value of these activities is not “outweighed” by any purportedly “dangerous” attributes. Imposing strict liability standards rather than negligence standards would have a profound and chilling effect on this vital economic activity.

Plaintiffs suggest logging above residential properties is “uncommon” and “inappropriate” as most timberland is remote, however, logging hillsides above residential property is hardly uncommon in Lewis County. “An activity is a matter of common usage if it is customarily carried on by the great mass of mankind **or by many people in the**

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<sup>13</sup> Washington Department of Natural Resources, 2011 Annual Report, [http://www.dnr.wa.gov/Publications/em\\_annualreport11.pdf](http://www.dnr.wa.gov/Publications/em_annualreport11.pdf), Appendix 5.

**community.”** Restatement 2<sup>nd</sup> of Torts § 520, comment *i*. Timber and forest products continue to play a critical role in the economy of Lewis County, and the Martin Road unit alone has been logged several times in the last 100 years. CP 500. Moreover, detailed regulations governing timber harvests on hillsides confirm that logging such slopes is both anticipated and routine. *See* WAC 222-10-030.

Balancing the risk of harm versus the utility of the activity counsels an opposite result than the Court reached in *Langan*. That case involved an instantaneous injury inflicted when chemicals dropped by a crop dusting plane contaminated an organic farm. Risk and utility were truly at issue because the activity resulted in contemporaneous injury, which is not the case here. Holding Menasha liable because the “risk” purportedly “materialized” would expose the logging industry to infinite liability, as any logging company may be held liable for damages occurring any time after logging takes place. Plaintiffs’ position is both impractical and untenable. How should the court define “steep slope,” “rain on snow zone,” or “residential” (versus “commercial?”) areas? What liability does a logging company have when residences are built below property previously logged? What about residential property that

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<sup>14</sup> Washington Department of Natural Resources, Wash. Mill Survey 2010, [http://www.dnr.wa.gov/Publications/obe\\_econ\\_rprt\\_millsurv\\_2010.pdf](http://www.dnr.wa.gov/Publications/obe_econ_rprt_millsurv_2010.pdf), Appendix 6, at p. vii.

might be located above a commercial forest? Plaintiffs' novel application of strict liability creates an unacceptably vague standard for future application, exposing Plaintiffs' true motivation, which is to enforce an *ad hoc* application of strict liability to suit their needs after their negligence claim failed at trial.

In *In re Flood Litig.*, 216 W. Va. 534, 607 S.E.2d 863 (2004), the Court found that various defendant coal companies, timbering companies, railroads, and gas companies could *not* be held strictly liable for damages sustained from flooding allegedly caused by extraction of resources from land:

Plaintiffs [state] their position is not that the extraction of natural resources, by its very nature, constitutes an abnormally dangerous activity, but that certain activities of Defendants in the course of extracting resources produce ancillary conditions that are unreasonably dangerous where the risk of flash flooding is concerned. In other words, say Plaintiffs, the alteration of the mountainous topography in southern West Virginia, which is the result of extraction of coal and timber, causes an abnormally high risk of flash flooding which should make Defendants strictly liable for damages.

*In re Flood Litig.*, 607 S.E.2d at 873, Appendix 7. After considering the § 520 provisions the Court in *In re Flood Litig.* soundly refused to declare logging an abnormally dangerous activity, and for good reason:

When we apply these factors to the facts before us, we find that Defendants are not strictly liable for their activities or

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<sup>15</sup> *Id.*

the conditions their activities create. This Court simply does not believe that the day to day activities of Defendants necessarily create a high risk of flash flooding. Also, we are convinced that any increased risk of flooding which results from Defendant's extractive activities can be greatly reduced by the exercise of due care. In addition, extractive activities such as coal mining and timbering are common activities in southern West Virginia. **Finally, we are unable to conclude that the great economic value of some of these extractive activities, such as coal mining, is outweighed by their dangerous attributes. Accordingly, we answer question 4, as reformulated, in the negative.**

*In re Flood Litig.*, 607 S.E.2d at 874 (emphasis added).

The same reasoning applies to the logging industry in Washington. There is no basis to single out *logging* as more hazardous than other industries, especially when the duties of uphill landowners have already been defined by the Court. *Price ex rel. Estate of Price v. City of Seattle*, 106 Wn.App. 647, 24 P.3d 1098 (2001). Applying strict liability would have a deeply negative effect on the logging industry, *especially* when “any increased risk of flooding which results from Defendant's extractive activities can be greatly reduced by the exercise of due care,” the State’s primary goal and purpose in regulating the logging industry. Plaintiffs’ strict liability claim should be rejected.<sup>16</sup>

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<sup>16</sup> Even under a strict liability theory Plaintiffs still “have the burden of proving **that the activity of the defendant** was the proximate cause of the alleged damages.” *Vern J. Oja & Associates v. Washington Park Towers, Inc.*, 15 Wn. App. 356, 363, 549 P.2d 63 (1976) *aff’d*, 89 Wn.2d 72, 569 P.2d 1141 (1977) (emphasis added). Plaintiffs offer no evidence or argument about the specific logging techniques employed by Menasha

**C. PLAINTIFFS' ARE UNABLE TO ESTABLISH THE ESSENTIAL ELEMENTS OF THEIR TRESPASS AND NUISANCE CLAIMS**

1. Plaintiffs' nuisance and trespass claims were properly dismissed as duplicative of their negligence claim.

Plaintiffs' causes of action for negligence, trespass, and nuisance are all premised on tort law. Washington has consistently recognized the general rule that when a party brings an action in tort, he or she has the burden of showing that:

(1) there is a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff against harm of the general type; (2) the defendant's conduct violated the duty; and (3) there was a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff.

*Hansen v. Washington Natural Gas Co.*, 27 Wn.App. 127, 129, 615 P.2d 1351 (1980); *McLeod v. Grant County School Dist.* 128, 42 Wn.2d 316, 255 P.2d 360 (1953).

*a. Plaintiffs' did not plead intentional conduct.*

**Trespass** may be intentional or negligent. *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 566, 213 P.3d 619, 624 (2009). Plaintiff's Second Amended Complaint clearly asserts a cause of action for

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(which the jury determined were not negligent). Rather, Plaintiffs confine their argument to the purported effect of logging on hill-slopes in general, which is insufficient to support proximate cause *in this case* in the absence of evidence about the effect *Menasha's activities had on this logging unit*. Correlation does not equal causation. *Sun Microsystems Inc. v. et al.*, 606 F.Supp.2d 1166 (2009).

*negligent*, and not *intentional* trespass. CP 766 (“Defendants **negligent** logging activities precipitated the physical invasion of plaintiffs’ properties by landslides logging debris, boulders, mud, rocks, gravel and water...”). Under CR 8(a) a Complaint must “contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.” The Complaint must “apprise the defendant of the nature of the plaintiff’s claims and the legal grounds on which the claims rest.” *Molloy v. Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993). “A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.” *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847, 850 (1999), quoting *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). Plaintiffs claim Menasha negligently failed to identify and stake off steep areas they contended should not have been logged. An alleged failure to act (omission) does not constitute *intentional* conduct as a matter of law. *Price*, 106 Wn.App. at 653.

*b. Plaintiffs’ trespass claim arises from the same set of facts as their negligence claim.*

Washington Courts are clear that trespass claims and negligence claims **arising from a single set of facts are treated as a single**

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**negligence claim.** *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn.App. 523, 546-47, 871 P.2d 601 (1994); *Kaech v. Lewis County*, 106 Wn.App. 523, 531, 871 P.2d 601 (1994)<sup>17</sup> (dismissing trespass and nuisance claims as duplicative of negligence claims). Plaintiffs rely on the same set of facts to support their negligence and trespass claims, despite their hindsight assertion that Menasha “intentionally clearcut slopes.” *Plaintiffs’ Brief at p. 31*. Plaintiffs’ Second Amended Complaint recites Menasha’s allegedly “negligent logging activities” only. Plaintiffs fail to plead anything suggesting Menasha knew or believed its logging activities would result in slides encroaching onto Plaintiffs’ land, and the record is entirely devoid of such evidence.

Plaintiffs rely on *Hedlund v. White*, 67 Wn.App. 409, 836 P.2d 250 (1992), and *Buxel v. King County*, 60 Wn.2d 404, 409, 374 P.2d 250 (1962), for the proposition that “[a]n action for trespass includes trespass by landslides and water.” *Plaintiffs’ brief at p. 34*. *Hedlund* and *Buxel* merely observe that trespass may include trespass by water. Neither case concerned landslides, and both cases involved an *intentional act* to purposely channel water onto the plaintiffs’ properties. There is no evidence that Menasha’s logging activities encroached on Plaintiffs’ land, or that Menasha purposely channeled water or any other material onto

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<sup>17</sup> Disapproved of on other grounds in *Phillips v. King County*, 87 Wn. App. 468, 488,

Plaintiffs' properties here. There is no evidence Menasha knew or believed its logging activities even *could* result in an encroachment on Plaintiffs' properties. In the absence of *any* evidence of *intentional* trespass, the claim is simply part and parcel of Plaintiffs' straightforward cause of action for negligence.

Plaintiffs attempt to sidestep its inability to plead or prove *intention* by applying a standard of *constructive knowledge*, arguing the Court need only find it was "reasonably foreseeable" to Menasha that its logging activities could have resulted in a landslide. In support of this argument Plaintiffs misapply the four elements of common law intentional trespass:

"(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages."

*Plaintiffs' Brief at p. 35*; see also *Grundy*, 151 Wn. App. at 567; *Wallace v. Lewis County*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006). Plaintiffs focus on the third element (reasonably foreseeability), while dismissing the second element (an "intentional act") as presumptively satisfied because Menasha "intended to shorn the trees" from the slope. *Plaintiffs' Brief at p. 35*. Plaintiffs should have taken a closer look at the myriad of

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943 P.2d 306 (1997).

cases defining an “intentional act,” which almost uniformly hold that an act is intentional **only** if the actor **subjectively desires the resulting outcome or is substantially certain that the outcome will occur**. See, e.g., *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 682, 709 P.2d 782 (1985), quoting Restatement (Second) of Torts § 8A (1965);<sup>18</sup> *Price ex rel. Estate of Price v. City of Seattle*, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001) (“intent element of trespass can be shown where the actor ‘knows that the consequences are **certain, or substantially certain**, to result from his act”); *Kaech*, 106 Wn.App. at 282 (claimant must show the defendant “desired the consequences of its actions, or he believed the consequences were substantially certain to result from its conduct”), and *Seal v. Naches-Selah Irr. Dist.*, 51 Wn. App. 1, 6, 751 P.2d 873 (1988), in which the Court stated:

...As discussed, the record discloses affirmative measures taken by the District to both prevent and alleviate seepage problems on the Seals' property. There has been no showing by the Seals to equate the District's conduct with a desire to allow water to seep into the orchard. The evidence indicates only negligence on the part of the District. Therefore, the Seals' claim of intentional trespass must fail.

*Seal*, 51 Wn. App. at 6.

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<sup>18</sup> Thus, when considering airborne particles from the copper smelter at issue, the *Bradley* Court found it was “...patent that the defendant acted on its own volition and had to appreciate with substantial certainty that the law of gravity would visit the effluence upon someone, somewhere.” Unlike *Bradley*, there are no “airbone particles” and there is no “substantial certainty” in this case.

“Reasonably foreseeability” alone is insufficient to prove intentional trespass. Plaintiffs must be able to show more than the fact that Menasha “intended to shorn the trees.” They must be able to show that Menasha “subjectively desired” to cause a landslide, or that it was “substantially certain” that a landslide would result. There is zero evidence supporting this far-fetched conclusion, which the trial court recognized when it dismissed Plaintiffs’ trespass claim.<sup>19</sup>

*c. Plaintiffs’ nuisance claim arises from the same set of facts as their negligence claim.*

To prove **nuisance**, Plaintiffs must show Menasha “substantially and unreasonably” interfered with the use and enjoyment of their property. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998); *Bodin v. City of Stanwood*, 79 Wn.App. 313, 318, n. 2, 901 P.2d 1065 (1995). Under RCW 7.48.120, nuisance is defined as “**unlawfully** doing an act, or **omitting to perform a duty**, which act or omission either

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<sup>19</sup> Plaintiffs cite the Restatement (2<sup>nd</sup>) of Torts § 158 for their fallback position that in the absence of *intention*, Menasha “trespassed” when it failed to remove landslide debris from the Plaintiffs’ properties. The Restatement (2<sup>nd</sup>) of Torts § 158 provides that “[o]ne is subject to liability to another for trespass...if he intentionally...fails to remove from the land a thing which he is under a duty to remove.” Plaintiffs offer zero analysis of what “duty” Menasha may have had to remove the slide debris from Plaintiffs’ properties. Washington Courts will not consider an inadequately briefed argument. *Bohn v. Cody*, 119 Wn.2d 357, 368, 832 P.2d 71 (1992); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by citation to the record will not be considered); RAP 10.3(a)(6). Moreover, Plaintiffs did not advance this argument to the trial court. A party may not generally raise a new argument on appeal that the party did not present to the trial court. *In re Det. of Ambers*, 160 Wn.2d 543, 557 n. 6, 158 P.3d 1144 (2007).

annoys, injures or endangers the comfort, repose, health or safety of others, offends decency ... or in any way renders other persons insecure in life, or in the use of property.”<sup>20</sup> To be actionable, the nuisance must be “injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of ... life and property.” RCW 7.48.010; see *Grundy*, 155 Wn.2d at 7; *Borden*, 113 Wn.App. at 373.

Washington Courts treat *nuisance* just like any other negligence claim when it is premised on an unlawful act or omission of a duty. See *Borden v. City of Olympia*, 113 Wn.App. 359, 373, 53 P.3d 1020 (2002) (Landowners brought action against city for inverse condemnation, trespass, nuisance, negligence, and waste after their property flooded; the Court recognized that the nuisance claim “is simply a negligence claim presented in the garb of nuisance.”)

...we are convinced that the trial court properly dismissed Owners' nuisance claim. In Washington, a “negligence claim presented in the garb of nuisance” need not be considered apart from the negligence claim. *Hostetler v. Ward*, 41 Wn.App. 343, 360, 704 P.2d 1193 (1985), *review denied*, 106 Wn.2d 1004 (1986). See also *Re v. Tenney*, 56 Wn. App. 394, 398 n. 3, 783 P.2d 632 (1989). In those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied. *Hostetler*, 41 Wn.App. at 360, 704 P.2d 1193. Cf. *Albin v. National Bank of Commerce*, 60 Wn.2d 745, 753, 375 P.2d 487 (1962) (trial court properly refused to

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<sup>20</sup> Logging is presumptively “reasonable” under RCW 7.48.305.

give a proposed instruction on nuisance which was based on the same omission to perform a duty which allegedly constituted negligence).

*Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn. 2d 506, 527-28, 799 P.2d 250 (1990).

In their Second Amended Complaint, Plaintiffs' premise their nuisance claim on Menasha's allegedly *negligent* conduct: "[t]he **manner in which Defendants clearcut** and built roads on the slopes above the plaintiffs' residences constituted a nuisance to the Plaintiffs." CP 766. Plaintiffs' theory is that Menasha's logging was implemented **without reasonable care**, a "negligence claim presented in the garb of nuisance."

Plaintiffs rely on *Peterson v. King County*, 45 Wn.2d 860, 862-63, 278 P.2d 774 (1954), to argue that "it is possible for the same act to constitute negligence and also give rise to a nuisance," while conceding that "in some instances, a nuisance arises from negligent conduct and, in such a case, the nuisance claim is subsumed within the negligence claim." *Plaintiffs' Brief at p. 31*, citing *Lewis v. Krussel*, 101 Wn. App. 178, 183, 2 P.3d 486 (2000). The law is clear. "Because [the plaintiff's] nuisance theory ... rests on the same set of facts as his negligence theory ..., it does not provide an alternative basis for damages." *Sourakli v. Kyriakos, Inc.* 144 Wn. App. 501, 515, 182 P.3d 985 (2008). Plaintiffs argue their nuisance claim is premised on *intentional* and not negligent conduct (the

“intentional” act of clear cutting), but for the same reasons stated above, this argument fails.

Plaintiffs’ cite *Ferry v. Seattle*, 116 Wash. 648, 200 P. 336, 203 P. 40 (1921), and *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910) to argue Menasha’s “intentional” clearcutting created a “prospective nuisance,” but this argument is unavailing. *Ferry* and *Paschall* have little or nothing to do with the instant matter. Both cases involve structures invoking reasonable (or unreasonable) public fear provoking loss in property values, situations that bear little resemblance to Plaintiffs’ claimed nuisance: a “steep slope...shorn of all its trees,<sup>21</sup> with roots dying and losing their strength to hold the slide prone slope in place...” *Plaintiffs’ Brief at p. 32.*

This Court should adhere to *Kaech*, 106 Wn. App. at 282 (dismissing trespass and nuisance claims as duplicative of negligence claims), and *Pepper*, 73 Wn.App. at 546 (same) and uphold the trial court’s dismissal of Plaintiffs’ nuisance claim as duplicative of their negligence claim.

2. Plaintiffs’ nuisance and trespass claims are no longer actionable because the jury determined Menasha was not negligent.

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<sup>21</sup> Actually, several trees were left in place pursuant to the FPA, and new trees were planted.

To the extent Plaintiffs' nuisance and trespass claims are premised on negligent conduct, Plaintiffs already submitted this claim to a jury. The jury found Menasha was not negligent. Plaintiffs' nuisance and trespass claims are consequently barred under the doctrine of collateral estoppel. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004), citing 14A Karl B. Tegland, *Washington Practice, Civil Procedure* § 35.32, at 475 (1st ed.2003) (collateral estoppel prevents a second litigation of an issue between the parties, even though a different claim or cause of action is asserted.); *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) (emphasis added), quoting *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978).

#### **D. REQUEST FOR FEES AND REASONABLE EXPENSES**

Pursuant to RAP 14.2 and RAP 18.1(b), Menasha respectfully requests that the Court issue an order awarding the reasonable attorneys' fees, costs, and expenses allowed under RAP 14.3 should it prevail.

### **VII. CONCLUSION**

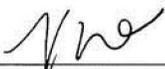
Plaintiffs should not be allowed to "set aside" the jury's determination that Menasha breached no duty and "re-try" this case as a hypothetical argument on strict liability, without any *specific factual evidence* supporting *proximate cause*. Plaintiffs should take their grievances to the legislature rather than saddle a logging company with

strict liability standards based on a theoretical duty to override the Department of Natural Resources and conduct additional geologic, hydrologic, and geomorphologic analyses of a logging unit identified by the Department as Class III. The trial court properly dismissed Plaintiffs' strict liability, trespass, and nuisance claims on summary judgment prior to trial.

DATED this 19<sup>th</sup> day of June, 2013.

Respectfully submitted:

FALLON & MCKINLEY

By:   
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Campbell Menasha LLC



## VIII. APPENDIX

1. RCW 76.09.050 (2000).
2. WAC 222-10-010 (March, 2000)
3. *Logging Industry in Lewis County*,  
<http://jtenlen.drizzlehosting.com/walewis/logging.html>
4. *Washington Department of Natural Resources, Washington Timber Harvest 2011*, at pp. v, 17,  
[http://www.dnr.wa.gov/Publications/obe\\_wa\\_timber\\_harvest\\_2011.pdf](http://www.dnr.wa.gov/Publications/obe_wa_timber_harvest_2011.pdf)
5. *Washington Department of Natural Resources, 2011 Annual Report*,  
[http://www.dnr.wa.gov/Publications/em\\_annualreport11.pdf](http://www.dnr.wa.gov/Publications/em_annualreport11.pdf)
6. *Washington Department of Natural Resources, Wash. Mill Survey 2010*, at p. vii,  
[http://www.dnr.wa.gov/Publications/obe\\_econ\\_rpmt\\_millsurv\\_2010.pdf](http://www.dnr.wa.gov/Publications/obe_econ_rpmt_millsurv_2010.pdf)
7. *In re Flood Litig.*, 216 W. Va. 534, 607 S.E.2d 863 (2004).

- (6) Any acquired interest in qualifying lands by the state under this section shall be managed as riparian open space. [1999 1st sp.s. c 4 § 701; 1997 c 173 § 1; 1994 c 264 § 48; 1993 c 443 § 2; 1988 c 36 § 46; 1987 c 95 § 8; 1974 ex.s. c 137 § 4.]

Note: *Part headings not law--1999 1st sp.s. c 4: See note following RCW 75.46.300.*

*Effective date--1993 c 443: See note following RCW 76.09.010.*

**RCW 76.09.050 Rules establishing classes of forest practices--Applications for classes of forest practices--Approval or disapproval--Notifications--Procedures--Appeals--Waiver.**

- (1) The board shall establish by rule which forest practices shall be included within each of the following classes:

**Class I:** Minimal or specific forest practices that have no direct potential for damaging a public resource and that may be conducted without submitting an application or a notification except that when the regulating authority is transferred to a local governmental entity, those Class I forest practices that involve timber harvesting or road construction within "urban growth areas," designated pursuant to chapter 36.70A RCW, are processed as Class IV forest practices, but are not subject to environmental review under chapter 43.21C RCW;

**Class II:** Forest practices which have a less than ordinary potential for damaging a public resource that may be conducted without submitting an application and may begin five calendar days, or such lesser time as the department may determine, after written notification by the operator, in the manner, content, and form as prescribed by the department, is received by the department. However, the work may not begin until all forest practice fees required under RCW 76.09.065 have been received by the department. Class II shall not include forest practices:

- (a) On lands platted after January 1, 1960, as provided in chapter 58.17 RCW or on lands that have or are being converted to another use;
- (b) Which require approvals under the provisions of the hydraulics act, RCW 75.20.100;
- (c) Within "shoreslines of the state" as defined in RCW 90.58.030;
- (d) Excluded from Class II by the board; or
- (e) Including timber harvesting or road construction within "urban growth areas," designated pursuant to chapter 36.70A RCW, which are Class IV;

**Class III:** Forest practices other than those contained in Class I, II, or IV. A Class III application must be approved or disapproved by the department within thirty calendar days from the date the department receives the application. However, the applicant may not begin work on that forest practice until all forest practice fees required under RCW 76.09.065 have been received by the department;

**Class IV:** Forest practices other than those contained in Class I or II:

- (a) On lands platted after January 1, 1960, as provided in chapter 58.17 RCW,
- (b) On lands that have or are being converted to another use,
- (c) On lands which, pursuant to RCW 76.09.070 as now or hereafter amended, are not to be reforested because of the likelihood of future conversion to urban development,
- (d) Except on those lands involving timber harvesting or road construction on lands that are contained within "urban growth areas," designated pursuant to chapter 36.70A RCW, where the forest landowner provides:
  - (i) A written statement of intent signed by the forest landowner not to convert to a use other than commercial forest product operations for ten years, accompanied by either a written forest management plan acceptable to the department or documentation that the land is enrolled under the provisions of chapter 84.33 RCW; or
  - (ii) A conversion option harvest plan approved by the local governmental entity and submitted to the department as part of the application, and/or
- (e) Which have a potential for a substantial impact on the environment and therefore require an evaluation by the department as to whether or not a detailed statement must be prepared pursuant to the state environmental policy act, chapter 43.21C RCW. Such evaluation shall be made within ten days from the date the department receives the application: PROVIDED, That nothing herein shall be construed to prevent any local or regional governmental entity from determining that a detailed statement must be prepared for an action pursuant to a Class IV forest practice taken by that governmental entity concerning

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the land on which forest practices will be conducted. A Class IV application must be approved or disapproved by the department within thirty calendar days from the date the department receives the application, unless the department determines that a detailed statement must be made, in which case the application must be approved or disapproved by the department within sixty calendar days from the date the department receives the application, unless the commissioner of public lands, through the promulgation of a formal order, determines that the process cannot be completed within such period. However, the applicant may not begin work on that forest practice until all forest practice fees required under RCW 76.09.065 have been received by the department.

Forest practices under Classes I, II, and III are exempt from the requirements for preparation of a detailed statement under the state environmental policy act.

- (2) Except for those forest practices being regulated by local governmental entities as provided elsewhere in this chapter, no Class II, Class III, or Class IV forest practice shall be commenced or continued after January 1, 1975, unless the department has received a notification with regard to a Class II forest practice or approved an application with regard to a Class III or Class IV forest practice containing all information required by RCW 76.09.060 as now or hereafter amended. However, in the event forest practices regulations necessary for the scheduled implementation of this chapter and RCW 90.48.420 have not been adopted in time to meet such schedules, the department shall have the authority to regulate forest practices and approve applications on such terms and conditions consistent with this chapter and RCW 90.48.420 and the purposes and policies of RCW 76.09.010 until applicable forest practices regulations are in effect.
- (3) Except for those forest practices being regulated by local governmental entities as provided elsewhere in this chapter, if a notification or application is delivered in person to the department by the operator or the operator's agent, the department shall immediately provide a dated receipt thereof. In all other cases, the department shall immediately mail a dated receipt to the operator.
- (4) Except for those forest practices being regulated by local governmental entities as provided elsewhere in this chapter, forest practices shall be conducted in accordance with the forest practices regulations, orders and directives as authorized by this chapter or the forest practices regulations, and the terms and conditions of any approved applications.
- (5) Except for those forest practices being regulated by local governmental entities as provided elsewhere in this chapter, the department of natural resources shall notify the applicant in writing of either its approval of the application or its disapproval of the application and the specific manner in which the application fails to comply with the provisions of this section or with the forest practices regulations. Except as provided otherwise in this section, if the department fails to either approve or disapprove an application or any portion thereof within the applicable time limit, the application shall be deemed approved and the operation may be commenced: PROVIDED, That this provision shall not apply to applications which are neither approved nor disapproved pursuant to the provisions of subsection (7) of this section: PROVIDED, FURTHER, That if seasonal field conditions prevent the department from being able to properly evaluate the application, the department may issue an approval conditional upon further review within sixty days: PROVIDED, FURTHER, That the department shall have until April 1, 1975, to approve or disapprove an application involving forest practices allowed to continue to April 1, 1975, under the provisions of subsection (2) of this section. Upon receipt of any notification or any satisfactorily completed application the department shall in any event no later than two business days after such receipt transmit a copy to the departments of ecology and fish and wildlife, and to the county, city, or town in whose jurisdiction the forest practice is to be commenced. Any comments by such agencies shall be directed to the department of natural resources.
- (6) For those forest practices regulated by the board and the department, if the county, city, or town believes that an application is inconsistent with this chapter, the forest practices regulations, or any local authority consistent with RCW 76.09.240 as now or hereafter amended, it may so notify the department and the applicant, specifying its objections.
- (7) For those forest practices regulated by the board and the department, the department shall not approve portions of applications to which a county, city, or town objects if:
  - (a) The department receives written notice from the county, city, or town of such objections within fourteen business days from the time of transmittal of the application to the county, city, or town, or one day before the department acts on the application, whichever is later; and
  - (b) The objections relate to lands either:
    - (i) Platted after January 1, 1960, as provided in chapter 58.17 RCW; or

- (ii) On lands that have or are being converted to another use. The department shall either disapprove those portions of such application or appeal the county, city, or town objections to the appeals board. If the objections related to subparagraphs (b)(i) and (ii) of this subsection are based on local authority consistent with RCW 76.09.240 as now or hereafter amended, the department shall disapprove the application until such time as the county, city, or town consents to its approval or such disapproval is reversed on appeal. The applicant shall be a party to all department appeals of county, city, or town objections. Unless the county, city, or town either consents or has waived its rights under this subsection, the department shall not approve portions of an application affecting such lands until the minimum time for county, city, or town objections has expired.
- (8) For those forest practices regulated by the board and the department, in addition to any rights under the above paragraph, the county, city, or town may appeal any department approval of an application with respect to any lands within its jurisdiction. The appeals board may suspend the department's approval in whole or in part pending such appeal where there exists potential for immediate and material damage to a public resource.
- (9) For those forest practices regulated by the board and the department, appeals under this section shall be made to the appeals board in the manner and time provided in RCW 76.09.220(8). In such appeals there shall be no presumption of correctness of either the county, city, or town or the department position.
- (10) For those forest practices regulated by the board and the department, the department shall, within four business days notify the county, city, or town of all notifications, approvals, and disapprovals of an application affecting lands within the county, city, or town, except to the extent the county, city, or town has waived its right to such notice.
- (11) For those forest practices regulated by the board and the department, a county, city, or town may waive in whole or in part its rights under this section, and may withdraw or modify any such waiver, at any time by written notice to the department. [1997 c 173 § 2; 1994 c 264 § 49; 1993 c 443 § 3; 1990 1st ex.s. c 17 § 61; 1988 c 36 § 47; 1987 c 95 § 9; 1975 1st ex.s. c 200 § 2; 1974 ex.s. c 137 § 5.]

*Note: Effective date—1993 c 443: See note following RCW 76.09.010.*

*Severability—Part, section headings not law—1990 1st ex.s. c 17: See RCW 36.70A.900 and 36.70A.901.*

**RCW 76.09.055 Findings—Emergency rule making authorized.**

- (1) The legislature finds that the declines of fish stocks throughout much of the state requires [require] immediate action to be taken to help restore these fish runs where possible. The legislature also recognizes that federal and state agencies, tribes, county representatives, and private timberland owners have spent considerable effort and time to develop the forests and fish report. Given the agreement of the parties, the legislature believes that the immediate adoption of emergency rules is appropriate in this particular instance. These rules can implement many provisions of the forests and fish report to protect the economic well-being of the state, and to minimize the risk to the state and landowners to legal challenges. This authority is not designed to set any precedents for the forest practices board in future rule making or set any precedents for other rule-making bodies of the state.
- (2) The forest practices board is authorized to adopt emergency rules amending the forest practices rules with respect to the protection of aquatic resources, in accordance with RCW 34.05.350, except:
- That the rules adopted under this section may remain in effect until permanent rules are adopted, or until June 30, 2001, whichever is sooner;
  - Notice of the proposed rules must be published in the Washington State Register as provided in RCW 34.05.320;
  - At least one public hearing must be conducted with an opportunity to provide oral and written comments; and
  - A rule-making file must be maintained as required by RCW 34.05.370. In adopting the emergency rules, the board is not required to prepare a small business economic impact statement under chapter 19.85 RCW, prepare a statement indicating whether the rules constitute a significant legislative rule under RCW 34.05.328, prepare a significant legislative rule analysis under RCW 34.05.328, or follow the procedural requirements of the state environmental policy act, chapter 43.21C RCW. The forest practices board may only adopt recommendations contained in the forests and fish report as emergency rules under this section. [1999 1st sp.s. c 4 § 201.]

~~SEPA Review of Forest Practices That Are Not Class IV-Special~~

AMENDATORY SECTION

**WAC 222-10-010 Policies and authorities.**

- (1) This chapter is promulgated pursuant to the authority granted in RCW 76.09.010, 43.21C.120 and chapter 197-11 WAC.
- (2) The forest practices board, according to RCW 76.09.040, possesses the authority to promulgate forest practices (~~(regulations)~~) rules establishing minimum standards for forest practices and setting forth necessary administrative provisions.
- (3) The forest practices board adopts by reference the policies of SEPA as set forth in RCW 43.21C.020.
- (4) A (~~Class IV-Special~~) forest practices application or notification which requires a threshold determination (~~(approval)~~) will be conditioned when necessary to mitigate specific adverse impacts which are identified in the environmental documents prepared under SEPA. An application (~~(for a Class IV-Special forest practice)~~) or notification will be denied when the proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under SEPA, and reasonable mitigation measures are insufficient to mitigate the identified impacts and denial is consistent with all provisions of the acts cited in subsection (1) of this section.
- (5) SEPA policies and procedures (~~(required for administration of Class IV-Special forest practices)~~) shall be implemented by the department of natural resources.

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## Logging Industry in Lewis Co., Washington

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The logging industry has played a significant role in Lewis County's economy since the late 1800s. The establishment of logging camps and saw mills brought in migrants from around the country, particularly from West Virginia, Virginia, Kentucky, and other eastern states. I hope to use this page to document known logging camps, saw mills, and other logging-related industries in Lewis Co., and provide links to resources where researchers can learn more. Unfortunately, I do not have much more information than what is presented here or elsewhere on the website. If you have information that may help others, please [contact me](#).

### Resources

- "The Chronicle" - the May, 1909 article has a detailed description of the logging and timber industry in Lewis County, as it existed in 1909.
- "[Lewis County Declaration](#)" - detailed description of the timber industry in Lewis County.
- "[Logging Camps](#)" - Dan Brown contributed this map drawn by Coy Brown in 1915, showing logging camps in western Lewis County and Pacific County.
- "Lumberjack Legends" - published in "Pacific Northwest Forum", these articles included a series of letters written by Lynn A. Hull, a Pe Ell native, describing life as a logger. [note: not all of the letters published in the journal were posted online] [Part 1](#) (Fall 1976 issue), [Part 2](#) (Winter 1977 issue), [Part 4](#) (Fall 1977 issue), [Part 6](#) (Winter 1978 issue), [Part 8](#) (Fall 1978 issue)
- "[Monthly Bulletin: Loyal Legion of Loggers and Lumbermen](#)", Vols. 1-2 (1918) [Digitized on Google Books]. This publication provides a fascinating look at the role of the logging industry, and the L. L. L. L. in supporting the United States efforts' during World War I.
- [Loyal Legion of Loggers and Lumbermen](#) - more information on the history of the L. L. L. L., largely written by Tim Davenport.
- "[Shop Safety Committee Campaign](#)" report of 1913-1914 - a listing of lumber companies in Lewis County that had formed committees to support workplace safety.
- "[South Bend Rail Line Once Had 29 Stops Over Run of 54 Miles](#)" - brief history of the South Bend branch of the Northern Pacific Railway. Published in "The Daily Chronicle," 6 Jun 1953.

### Listing of companies

Location	Company
Adna	<ul style="list-style-type: none"> <li>• Adna Mill Company</li> <li>• Syverson Lumber Company (operated by Harold J. Syverson. See his <a href="#">obituary</a> for more information.)</li> </ul>
Ainslie	<ul style="list-style-type: none"> <li>• Ainslie Lumber Company (open from 1884-1893)</li> </ul>
Bunker	<ul style="list-style-type: none"> <li>• Hill Logging Company (burned down in 1919; <a href="#">Rich Detering</a> is researching the history of this company and has contributed a series of <a href="#">newspaper articles</a> about the company.)</li> </ul>
Carlson	<ul style="list-style-type: none"> <li>• Carlson Saw Mill</li> </ul>
Centralia	<ul style="list-style-type: none"> <li>• Agnew Lumber Company</li> <li>• Chehalis River Lumber &amp; Shingle Company (listed in "<a href="#">Shop Safety Committee Campaign</a>" report of 1913-1914.)</li> <li>• Centralia Shingle Company (see photo from <a href="#">1909</a>.)</li> </ul>

- Eastern Railway & Lumber Company  
(listed in "[Shop Safety Committee Campaign](#)" report of 1913-1914. See also the biographies of [D. F. Davies](#) and [F. B. Hubbard](#).)
  - Fowler-Boyer Lumber Company  
(saw mill operated by Charles R. Fowler and Martin L. Boyer; listed in [1901 business directory](#).)
  - Gougar Lumber Company  
(saw mill operated by Frank Gougar and George Atkinson; listed in [1901 business directory](#).)
  - H. H. Martin Lumber Company (formerly the Gilchrist Brothers Mill)  
(operated by H. H. Martin. See biographies of [H. H. Martin](#) and his son, [F. A. Martin](#) for more information.)
  - Lang and Thomas Shingle Mill  
(operated by T. Thomas and Frank Lang. See [T. Thomas's](#) biography for more information.)
  - Lincoln Creek Lumber Company
  - Pacific Lumber Company  
(organized by Frank D. Harm. See his [biography](#) for more information.)
  - Salzer Lumber Company  
(saw mill, listed in [1901 business directory](#).)
- Ceres
- Valley Lumber Company  
(Mentioned in the "[Monthly Bulletin: Loyal Legion of Loggers and Lumbermen](#)".)
- Chehalis
- Brown Mill
  - Chehalis Mill Company  
(founded by Chauncey A. Doty and A. J. Davis. See [A. J. Davis's](#) and See biography of founder [Chauncey A. Doty's](#) biographies for more information.)
  - Coal Creek Lumber Company  
(established in 1905 by C. L. Brown, A. H. Brown and D. A. Clark. Operated by Carroll L. Brown. See his [biography](#) for more information.)
  - Date Lumber Company
  - General Lumber Company  
(operated by Charles McGuire. See his [obituary](#) for more information.)
  - Mealey Lumber Company  
(saw mill operated by Henry Allen; listed in [1901 business directory](#).)
  - Ralph Moerke Logging Company (renamed Moerke & Sons, Inc.)  
(still in operation)
  - St. Helens Lumber Company  
(see [note about purchase in 1905](#))
- Curtis
- Dane, Myers & Stewart Sawmill  
(see [1923 article](#).)
- Doty
- Doty Shingle & Lumber Company (formerly known as Doty and Stoddard Saw Mill)  
(listed in the [1901 business directory](#) as "Doty and Stoddard"; listed in "[Shop Safety Committee Campaign](#)" report of 1913-1914 as "Doty Shingle & Lumber Co.". See biography of founder [Chauncey A. Doty](#).)
- Dryad

- Dryad Lumber Company  
(see photos at the [University of Washington's Digital Collections.](#))
  - E. M. Chandler & Bro.  
(shingle mill; listed in the [1901 business directory.](#))
  - Luedinghaus Brothers Shingle & Sawmill
  - G. A. Onn  
(shingle mill, closed in 1930; listed in the [1901 business directory.](#))
  - Schafer Brothers Logging Company & Sawmill
- Ethel
- Harry Hawkins  
(saw mill; listed in the [1901 business directory.](#))
  - Superior Logging Company
- Guerrier
- J. P. Guerrier Lumber Company  
([article](#))
- Independence
- William Fishler  
(saw mill; listed in the [1901 business directory.](#))
  - Independence Logging Company
- Klaber
- Klaber Lumber Company  
([1922 article](#), [1923 article.](#))
- Kosmos  
(formerly Fulton)
- Hopkinson Bros.  
(saw mill; listed in the [1901 business directory.](#))
  - Kosmos Timber Company  
(see photos on [Jeff Steiner's website](#) and the [University of Washington's Digital Collections.](#))
  - Albert Miller  
(saw mill; listed in the [1901 business directory.](#))
- Lacamas
- Lacamas Logging Camp
- Lindberg  
(formerly Coal  
Canyon)
- Linco Log and Lumber Company
  - Taylor Logging and Lumber  
(founded by Gustaf Lindberg in 1918)
- Littell
- Chehalis Lumber Company
  - Chester Snow Log & Shingle Company  
(listed in "[Shop Safety Committee Campaign](#)" report of 1913-1914. See also biography of founder [Chauncey A. Doty](#). Closed in 1917, and purchased by the Snow Lumber and Shingle Company.)
  - Wisconsin Lumber Company
- Mayfield
- J. Jorgenson  
(saw mill; listed in the [1901 business directory.](#))
- Mays
- Baker-May Lumber Company  
(saw mill and logging camp; described in this [1914 article.](#))
- McCormick
- McCormick Lumber Company  
(listed in the [1901 business directory](#); see [John Leigh](#) biography for more information; photos available in the [University of Washington's Digital Collections.](#))

- Reynolds & Davie Lumber Company  
(listed in the [1901 business directory](#).)
- Menefee
- Menefee Saw Mill
- Meskill
- Meskill Lumber Company
  - Schaefer Logging Company
- Mineral
- M. R. Smith Shingle Co.
  - Mineral Lake Sawmill and Lumber Company  
(Founded by John Donahue in 1905 on property he purchased from Fred Naslund, Mineral Lake pioneer. The mill burned down in 1922.)
  - St. Regis Logging Company
  - West Fork Logging Company  
(see [photos](#) in the University of Washington's Digital Collections.  
Included the Ladd Logging Camp.)
- Morton
- George Chesser Sawmill  
(operated near Davis Lake from 1916 until 1919, when the sawmill burned down.)
  - Lake Creek Lumber and Shingle Company  
(founded by Fred Broadbent and George Francis in 1911).
  - Lake Creek Shingle Company  
(originally begun by Henry Temple and family in the late 1880s; listed in "[Shop Safety Committee Campaign](#)" report of 1913-1914.)
  - Lytle-Inch Lumber Company
  - Marenakas Logging Company
  - Pankee Mill
  - Peterman Logging Company
  - Tubafor Mill  
(founded in the 1940s; now [TMI Forest Products, Inc.](#))
- Napavine
- Brown Bros.  
(saw mill; listed in the [1901 business directory](#).)
  - Emery & Nelson Lumber Company  
(listed in "[Shop Safety Committee Campaign](#)" report of 1913-1914. See also biographies of founders [W. W. Emery](#) and [Chauncey A. Doty](#).)
  - George McCoy  
(shingle and saw mill; listed in the [1901 business directory](#).)
  - Holman-O'Neill Lumber Company
  - H. Pitcher  
(saw mill; listed in the [1901 business directory](#).)
  - R. M. Shaver Mill
  - Somerville Brothers sawmill  
(listed in the [1901 business directory](#); see [photo](#) on University of Washington's Digital Collections site.)
- Onalaska  
(formerly Carlisle)
- Carlisle Lumber Company
  - J. P. Guerrier Logging Co.

- Onalaska Lumber Company  
(founded by the Carlisle family, who also owned the Copalis Lumber Company in Carlisle, Grays Harbor Co., Washington. See [William A. Carlisle's biography](#) for more information.)
- Packwood
- Packwood Lumber Company (still in operation; formerly the Kerr Brothers mill)  
(see [History of Packwood](#) for more information.)
- Pe Ell
- Apex Lumber Company
  - Chehalis River Mill Company  
(shingle mill; listed in the [1901 business directory](#).)
  - John Kotula Logging Company
  - Muller, Marzell and Company  
(saw mill; listed in the [1901 business directory](#).)
  - Yeomans Lumber Company  
(established in 1893 by Wallace C. Yeomans; listed in the [1901 business directory](#); listed in "Shop Safety Committee Campaign" report of 1913-1914.)
- Reynolds
- Reynolds & Davie Lumber Company  
(listed in the [1901 business directory](#).)
- Ruth
- Chapman Logging Company  
(opened approx. 1930; mentioned in the [May 1930 issue of "The Milwaukee Magazine"](#).)
- Salkum
- C. Jergeson  
(saw mill; listed in the [1901 business directory](#).)
- Toledo
- Calvin & Son  
(listed in the [1901 business directory](#).)
  - William M. Benefiel  
(listed in the [1901 business directory](#).)
- Vader  
(formerly Little Falls)
- Stillwater Lumber Company
  - Chehalis Woodworking and Manufacturing Company
- Walville
- Rock Creek Lumber Company (renamed Walville Lumber Company)  
(operated from 1898 to 1930; listed in the [1901 business directory](#); see [photo](#) of logging crew from 1923 and other [photos](#) in the University of Washington's Digital Collections.)
- Wildwood
- Puyallup Veneer & Lumber Company  
(see [1930 newspaper article](#) for more information)
- Winlock
- Emery & Veness Company (sawmill)
  - L. B. Menefee Lumber Company
  - Prescott & Veness Company (renamed J. A. Veness Lumber Company, then bought by O'Connell Lumber Company)  
(organized by J. A. Veness and A. L. Prescott; listed as "Prescott, Veness & Co." in the [1901 business directory](#); see his [biography](#) for more information.)
  - J. E. Pumphrey & Son Logging Company

- Sprague Lumber Company  
(in operation until 1929, when it was bought by the England family)
  - J. A. Veness Lumber Company (established after O'Connell Lumber Company bought out original J. A. Veness company)
- Winston
- Andron Lumber Company
  - Howard Lumber Company
- 

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# Washington Timber Harvest 2011

November 2012



WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**  
Peter Goldmark - Commissioner of Public Lands

## Westside Volumes of Harvested Trees

by Ownerships and Counties

Thousand Board Feet, Scribner

County	PRIVATE LANDS	STATE LANDS	FEDERAL LANDS	OTHER PUBLIC	TOTAL VOLUME
Clallam	143,948	42,851	345	664	187,808
Clark	24,982	33,606	0	24	58,612
Cowlitz	192,034	53,176	305	0	245,515
Grays Harbor	254,649	60,090	4,856	23,271	342,866
Island	2,315	0	0	0	2,315
Jefferson	90,216	31,090	3,023	0	124,329
King	103,435	9,280	815	841	114,371
Kitsap	17,345	1	0	3,266	20,612
Lewis	337,582	72,083	1,350	37	411,052
Mason	92,611	16,119	1,449	65	110,244
Pacific	207,600	28,156	344	0	236,100
Pierce	127,607	6,588	6,913	826	141,934
San Juan	308	0	0	0	308
Skagit	58,459	53,063	0	0	111,522
Skamania	53,231	2,236	6,734	0	62,201
Snohomish	68,162	65,927	3,201	1,525	138,815
Thurston	58,843	29,156	3,644	491	92,134
Wahkiakum	57,160	20,751	0	146	78,057
Whatcom	52,826	30,663	0	17	83,506
<b>Westside Totals</b>	<b>1,943,313</b>	<b>554,836</b>	<b>32,979</b>	<b>31,173</b>	<b>2,562,301</b>
<b>East / West Totals</b>	<b>2,206,644</b>	<b>636,863</b>	<b>108,661</b>	<b>32,785</b>	<b>2,984,953</b>

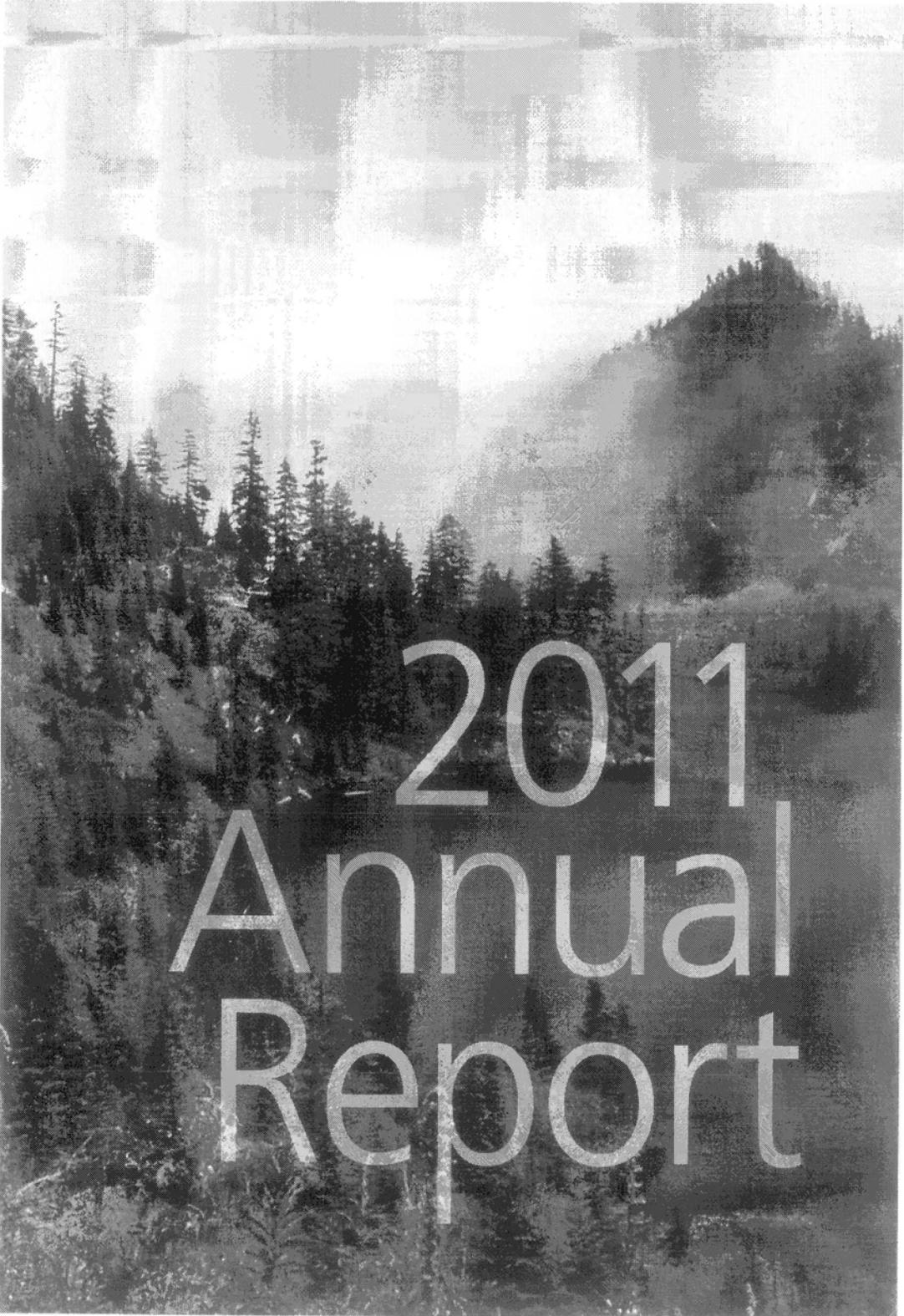
Western Washington Timber Harvest

**Lewis County 2011**

Thousand board feet, Scribner rule

----- Species -----

Ownership	DOUGLAS FIR	WESTERN HEMLOCK	CEDARS	PONDEROSA PINE	OTHER PINE	OTHER CONIFERS	RED ALDER	OTHER HARDWOODS	TOTAL VOLUME
Private - Industrial	102,651	40,712	672	0	0	18,376	5,422	283	<b>168,116</b>
Private - Large	78,303	21,537	1,467	0	0	19,860	5,306	700	<b>127,173</b>
Private - Small	11,713	141	283	0	0	20,307	636	3,576	<b>36,656</b>
Private - Unknown	3,980	68	27	0	0	1,546	16	0	<b>5,637</b>
<b>Total Private</b>	<b>196,647</b>	<b>62,458</b>	<b>2,449</b>	<b>0</b>	<b>0</b>	<b>60,089</b>	<b>11,380</b>	<b>4,559</b>	<b>337,582</b>
State	52,287	9,615	1,025	4	0	2,086	5,839	1,227	<b>72,083</b>
Federal	1,346	4	0	0	0	0	0	0	<b>1,350</b>
Other Public	37	0	0	0	0	0	0	0	<b>37</b>
<b>Total Public</b>	<b>53,670</b>	<b>9,619</b>	<b>1,025</b>	<b>4</b>	<b>0</b>	<b>2,086</b>	<b>5,839</b>	<b>1,227</b>	<b>73,470</b>
<b>Total All Owners</b>	<b>250,317</b>	<b>72,077</b>	<b>3,474</b>	<b>4</b>	<b>0</b>	<b>62,175</b>	<b>17,219</b>	<b>5,786</b>	<b>411,052</b>



# 2011 Annual Report



WASHINGTON STATE  
**Natural Resources**

## State Forest Lands | FY 2011

Source	REVENUE	CONTRIBUTING LANDS	
	Total Funds	Transfer Lands	Purchase Lands
<b>Sales</b>			
Timber Sales	\$98,509,768	\$86,153,311	\$12,356,457
Timber Sales-Related Activities <sup>1</sup>	26,218	25,070	1,147
	<b>\$98,535,986</b>	<b>\$86,178,382</b>	<b>\$12,357,604</b>
<b>Leases</b>			
Agriculture/Minor Forest Products	\$254,973	\$216,010	\$38,963
Commercial/Special Use	80,931	60,960	19,971
Mineral and Hydrocarbon	115,988	115,988	0
Rights-Of-Way	103,017	91,345	11,672
Communication Sites	1,228,806	892,417	336,389
	<b>\$1,783,716</b>	<b>\$1,376,720</b>	<b>\$406,995</b>
<b>Other Revenue</b>			
Interest Income <sup>1</sup>	\$64,560	\$56,002	\$8,558
Permits, Fees and Miscellaneous <sup>1</sup>	250	250	0
Treasurer's Revenue <sup>17</sup>	18,356	n/a	n/a
FDA Non-Trust Revenue <sup>15</sup>	10,076	n/a	n/a
	<b>\$93,243</b>	<b>\$56,252</b>	<b>\$8,558</b>
<b>Totals</b>	<b>\$100,412,944</b>	<b>\$87,611,354</b>	<b>\$12,773,158</b>

#### About This Page and Next Page

Income from these lands is distributed to the counties in which the lands are located, the state General Fund for the support of common schools, and the Forest Development Account (FDA) for DNR's Land Management expenses on these lands. There are two categories of State Forest Lands (formerly known as Forest Board Lands): Purchase lands and Transfer lands.

**Purchase lands** were given to the state or purchased by the state at low cost. The FDA receives half the income from these lands. The other half is divided between the respective county and the state General Fund for the support of common schools.

N/A: Not applicable.

See Fiscal Notes, pages 54-58. Totals may not add, due to rounding.

# State Forest Lands | FY 2011 CONTINUED

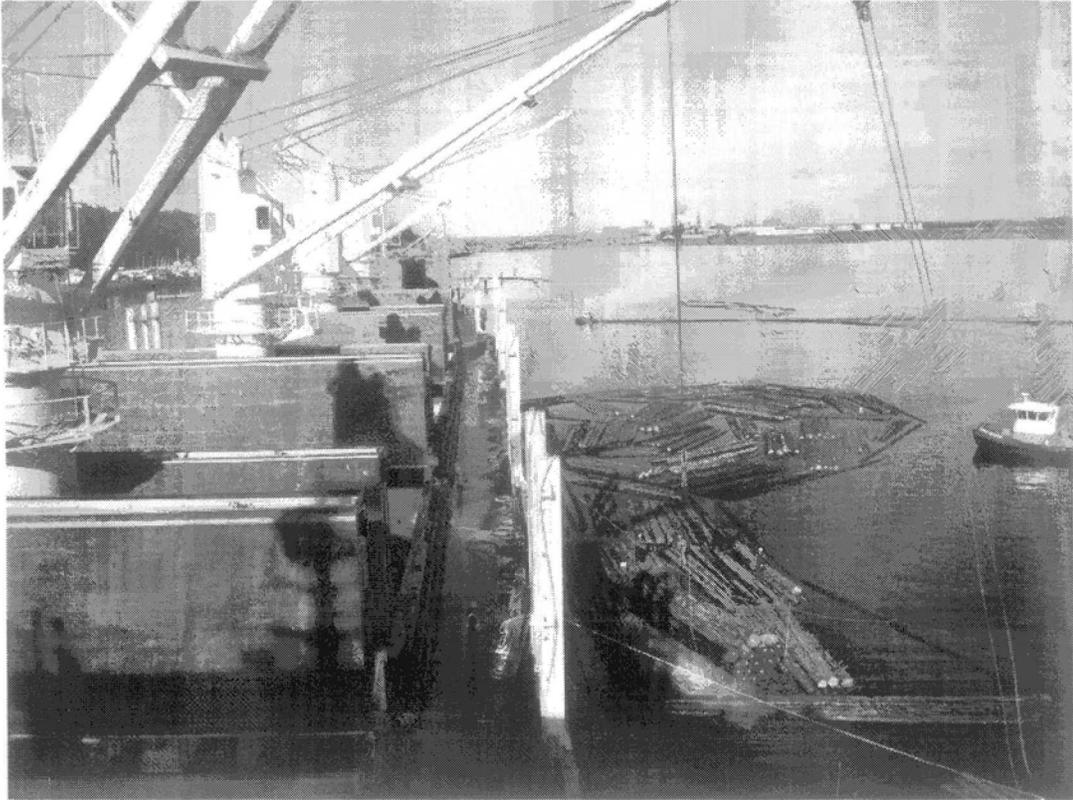
Recipient	REVENUE DISTRIBUTION		CONTRIBUTING LANDS	
	Total Funds	Transfer Lands	Purchase Lands	
County				
Clallam	\$6,656,971	\$6,615,908	\$41,063	
Clark	5,250,739	5,246,725	4,014	
Cowlitz	2,128,264	2,126,716	1,548	
Grays Harbor	1,956,674	474,589	1,482,085	
Jefferson	2,900,982	2,900,982	0	
King	1,503,406	1,503,406	0	
Kitsap	129,461	102,548	26,913	
Klickitat	482,356	482,356	0	
Lewis	8,897,626	8,867,027	30,598	
Mason	2,549,381	2,548,596	785	
Okanogan	48	48	0	
Pacific	1,679,411	1,345,735	333,676	
Pierce	1,137,814	1,120,711	17,103	
Skagit	12,477,738	12,477,738	0	
Skamania	790,831	789,342	1,489	
Snohomish	11,580,548	11,580,548	0	
Stevens	54,608	54,608	0	
Thurston	3,828,886	1,319,723	2,509,163	
Wahkiakum	2,255,878	2,255,878	0	
Whatcom	4,229,541	4,216,042	13,499	
Treasurer's Revenue <sup>17</sup>	18,356	N/A	N/A	
	<b>\$70,509,518</b>	<b>\$66,029,225</b>	<b>\$4,461,937</b>	
Forest Development Account				
Trust Activity	\$25,744,105	\$21,567,959	\$4,176,146	
Permits, Fees and Miscellaneous <sup>1</sup>	18,461	14,170	4,291	
Treasurer's Revenue	0	N/A	N/A	
FDA Non-Trust Revenue <sup>15</sup>	10,076	N/A	N/A	
	<b>\$25,772,642</b>	<b>\$21,582,129</b>	<b>\$4,180,437</b>	
General Fund - State	\$4,130,784	\$0	\$4,130,784	
<b>Totals</b>	<b>\$100,412,944</b>	<b>\$87,611,354</b>	<b>\$12,773,158</b>	

**Transfer lands** were forfeited to the counties in which they were located when the private landowners failed to pay property taxes, primarily in the 1920s and 1930s. The counties turned the lands over to the state. DNR now manages these lands and distributes at least 75 percent of the income to the counties and up to 25 percent of the income to the Forest Development Account (FDA).

Effective March 10, 2008, per Board of Natural Resources Resolution No. 1256, the distribution of revenue on State Forest Transfer lands was established at 75 percent to the county and 25 percent to the Forest Development Account (FDA).

N/A: not applicable.

See Fiscal Notes, pages 54-58. Totals may not add, due to rounding.



# Washington Mill Survey 2010

Series Report #21

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March 2012



WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**  
Peter Goldmark - Commissioner of Public Lands

## Introduction

This report is a census of Washington's primary wood products industry. It covers mills and log exporting operations that traditionally use logs. While pulp and plywood mills have modified their manufacturing processes and now use few logs, they are kept in the Mill Survey to maintain statistical continuity.

Few places on earth grow timber—Douglas fir and related species—that produce prized structural lumber so efficiently as in Washington's productive coastal sites. In just 30 years Douglas-fir trees can reach a merchantable size with a diameter of 12 to 16 inches or larger and a height of 70 to 90 feet, depending on the site. A single acre of trees grown to a rotation age of 60 years can yield 30,000 to 60,000 board feet, enough to build two to three average-sized homes.

That compares favorably with Georgia, which is the second largest producer of logs in the U.S. South where forests and wood products is a major economic engine. Georgia's industrial loblolly pine forests annually yield only 3,000 to 10,000 board feet per acre. In 2007 Georgia's total harvest was 1 bbf. Washington produced three times as much.

The U.S. is the world's largest producer of softwood products. Among states, Washington is the second largest producer after Oregon. In Washington, 16.2 million acres (out of a total of 23 million forested acres) primarily produce softwood.

Computer software and aerospace industries are major drivers in Washington's economy. Wood products contribute nearly \$5 billion annually or 1.5 percent of the state's Gross Domestic Product. The economic impact of wood is compounded because it is ranked the state's third largest export commodity, according to the state's Department of Commerce.

Though the industry has been seriously affected by the prolonged recession with its fallout on housing construction, the log export sector saw a burst of business in 2010 primarily from China. Total exports were 916 mmbf,

### Seven wood product sectors:

- Sawmills
- Veneer and Plywood
- Log Chipping
- Pulp
- Post, Pole, and Piling
- Shake and Shingle
- Log Export Operations

increasing 70 percent from 2006. Eastern Washington also deserves prominent mention since its mills consume 10.4 percent of the state's total log volume.

The agricultural side of managing forest lands (growing, logging) by itself is worth nearly \$2 billion in gross business income annually, according to the state's Department of Revenue.

Published biennially since the late 1960s, *Washington Mill Survey* covers product manufacturing and mill characteristics from data reported by mill managers and owners.

While other agencies and private wood industry associations publish general summaries, the Mill Survey provides unique details and statistics. The tables include data on log volumes, mill capacities, log species, days of operation, and the uses of wood residues. It is a resource for a wide audience of industry managers, economists, public officials and state residents.

Most log measurements are in thousand board feet Scribner rule—a mid-19th century scale that estimates a log's potential lumber volume. It factors in the taper, the low end diameter and height. Due to mill efficiencies in recent decades, sawmills' net output (measured in "lumber tally") usually exceeds log input in Scribner scale. This explains why in 2010 sawmills produced 28 percent less mill residue than in 2000.

Since the survey covers the entire industry, sampling errors are not a factor. However, some data were estimated based on statistics from previous years. Also some tables and categories (industries, counties or economic areas) were combined into "Other" categories to avoid disclosure of any company's proprietary data.

216 W.Va. 534  
Supreme Court of Appeals of West Virginia.

In re: FLOOD LITIGATION.

No. 31688. | Submitted Sept. 1, 2004. | Decided Dec.  
9, 2004.

### Synopsis

**Background:** Landowners brought actions against various defendants, including coal companies, timbering companies, railroads, and gas companies, for damages sustained in flooding. The Flood Litigation Panel, Gary L. Johnson, J., certified questions for the Supreme Court of Appeals.

**Holdings:** The Supreme Court of Appeals, Maynard, C.J., held that:

[1] adjacent and non-adjacent landowners had cognizable claims against defendants based on unreasonable use of land in dealing with surface waters;

[2] landowners who suffered flood damage had a cognizable negligence claim;

[3] defendants were not strictly liable for flood damage allegedly caused by extraction of resources from land;

[4] riparian owners had a cause of action for interference with riparian rights for alleged alteration of land that caused streams and rivers to flood;

[5] state court action was not preempted by federal regulation of extraction and removal of natural resources;

[6] compliance with regulations did not give rise to presumption that defendants acted reasonably in extraction activities; and

[7] defendants were liable only for alleged flood damage caused by their activities.

Questions answered.

West Headnotes (34)

<sup>111</sup> **Appeal and Error**  
☞Cases Triable in Appellate Court

The appellate standard of review of questions of law answered and certified by a circuit court is de novo.

<sup>121</sup> **Water Law**  
☞Rule of reasonableness in general

The *Morris Associates, Inc. v. Priddy* reasonableness test regarding surface waters was not limited to claims for the diversion of surface waters onto adjoining landowners' property; non-adjacent landowners were permitted to bring such claims.

<sup>131</sup> **Water Law**  
☞Rule of reasonableness in general

Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility; ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact.

<sup>141</sup> **Water Law**  
☞Artificial drainage or discharge in general

Adjacent and non-adjacent landowners had cognizable causes of action against various defendants, including coal companies, timbering companies, railroads, and gas companies based

on allegations of unreasonable use of land under the balancing test set forth in *Morris Associates, Inc. v. Priddy* for dealing with surface waters, where landowners alleged that the disturbance of the land by defendants caused an increase in the peak flow of surface water onto the properties during rainstorm.

3 Cases that cite this headnote

151

**Water Law**

☞Rule of reasonableness in general

In determining whether a landowner has acted reasonably in dealing with surface water pursuant to the reasonable use rule, the jury generally should consider all relevant circumstances, including such factors as amount of harm caused, foreseeability of harm on part of landowner making alteration in the flow of surface waters, and the purpose or motive with which the landowner acted.

1 Cases that cite this headnote

161

**Water Law**

☞Nuisance

There is nothing in the broad and inclusive definition of "private nuisance," which is defined as conduct that is intentional and unreasonable, negligent or reckless, or that results in an abnormally dangerous conditions or activities in an inappropriate place, that necessarily excludes a cause of action in nuisance for surface water diversion.

171

**Nuisance**

☞What Constitutes Nuisance in General

A private nuisance is not limited to repeated or continuous interference with another's use of land.

181

**Water Law**

☞Rights of action and defenses in general

Landowners who suffered flood damage had a cognizable cause of action for negligence against defendants, which included coal companies, timbering companies, railroads, and gas companies, for their alleged negligent use of their land which contributed to flooding.

191

**Negligence**

☞Breach of Duty

In matters of negligence, liability attaches to a wrongdoer because of a breach of duty which results in injury to others.

1101

**Negligence**

☞Foreseeability

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised; the test is, would the ordinary man or woman in the defendant's position, knowing what he or she knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?.

1111

**Water Law**

☞Artificial drainage or discharge in general

**Water Law**

☞Persons liable

The operation of extracting and removing

natural resources was not an abnormally dangerous activity that made coal and timbering companies strictly liable for damages caused by flash flooding; the day to day activities of such companies did not necessarily create a high risk of flash flooding, any increased risk for flooding could be greatly reduced by the exercise of due care, coal mining and timbering were common in the State, and the economic value of such extractive activities was not outweighed by their alleged dangerous attributes.

4 Cases that cite this headnote

- [12] **Water Law**  
☞Right to have natural drainage maintained  
**Water Law**  
☞Discharge into natural drain or watercourse

Riparian owners had a cause of action for interference with riparian rights against various defendants, which included coal companies, timbering companies, railroads, and gas companies, that altered the land and allegedly caused flooding of streams and rivers in watersheds and sub-watersheds; riparian owners had a right to the natural flow of a stream running adjacent to or through their property and a substantial increase in the natural flow, such as occurred during flood, was an infringement of that right.

- [13] **Water Law**  
☞Maintenance of natural flow of watercourse

The riparian owner has a property interest in the flow of a natural watercourse through or adjacent to his or her property; the right of enjoying this flow without disturbance, interference, or material diminution by any other proprietor is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself without molestation from his neighbors.

- [14] **Water Law**  
☞Interest in real property, or personalty

The right of property in a riparian right is in the right to use the flow, and not in the specific water.

- [15] **Water Law**  
☞Maintenance of natural flow of watercourse  
**Water Law**  
☞Reasonable use

The riparian owner's right is to have the water pass his land in its natural course; each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality, or detain it so as to deprive other proprietors or the public of a fair and reasonable participation in its benefits.

- [16] **Water Law**  
☞Right of action in general  
**Water Law**  
☞Right of action in general  
**Water Law**  
☞Right of action in general

The obstruction or diversion of the natural watercourse or the introduction into it of sediment, sludge, refuse or other materials which corrupt the quality of the water by upper riparian owners or users constitutes an infringement of the lower riparian owner's property right, which may be enjoined or give rise to a cause of action for damages.

<sup>1171</sup> **Water Law**  
☞ Maintenance of natural flow of watercourse

The right of a riparian proprietor to have the water of a stream pass his land in its natural flow is a right annexed to the soil and exists as a parcel of the land.

<sup>1181</sup> **Water Law**  
☞ Injury to Riparian Rights by Diversion of Waters

A diversion of a natural water course, though without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage.

<sup>1191</sup> **Water Law**  
☞ Nature and Extent of Rights in General

The right of a riparian owner to the natural flow of the stream is not dependent upon its value to him or the use which he makes of it.

<sup>1201</sup> **Water Law**  
☞ Injury to Downstream Owners' Rights by Obstruction or Detention of Waters  
**Water Law**  
☞ Injury to Riparian Rights by Diversion of Waters

The obstruction or the diversion of a natural watercourse which restricts the natural flow of the water of the stream and causes such water to overflow, accumulate and stand upon the land through which such watercourse passes is an infringement of a property right of the landowner and imports damage to such land.

<sup>1211</sup> **States**  
☞ Preemption in general  
**States**  
☞ State police power

As a general rule, federal preemption is disfavored in the absence of convincing evidence warranting its application; there is a strong presumption that Congress does not intend to preempt areas of traditional state regulation.

<sup>1221</sup> **States**  
☞ Congressional intent

To establish a case of express federal preemption requires proof that Congress, through specific language, preempted the specific field covered by state law.

<sup>1231</sup> **States**  
☞ Congressional intent

To prevail on a claim of implied federal preemption, evidence of a congressional intent to pre-empt the specific field covered by state law must be pinpointed.

<sup>1241</sup> **States**  
☞ Occupation of field

“Field preemption” occurs where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.

measures.

[25]

**States**

↔Conflicting or conforming laws or regulations

“Conflict preemption” occurs where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[26]

**Mines and Minerals**

↔State law and regulations in general

**States**

↔Mines and minerals

State court action against defendants that extracted natural resources from the land, which included coal companies, timbering companies, railroads, and gas companies, for damages sustained by landowners from flooding was not preempted by federal regulation of extraction and removal of natural resources, where there was no express federal statutory language that preempted state causes of action arising from such activity and state legislation, such as the Surface Coal Mining and Reclamation Act, indicated that Congress left ample room for state regulation of the extraction and removal of natural resources. West’s Ann.W.Va.Code, 22-3-1 to 22-3-19.

1 Cases that cite this headnote

[27]

**Negligence**

↔Knowledge or notice

If the defendants, who were in compliance with regulations, knew or should have known of some risk that would be prevented by reasonable measures not required by the regulation, they were negligent if they did not take such

[28]

**Negligence**

↔Standard established by statute or regulation

A statute or regulation merely sets a floor of due care; circumstances may require greater care, if a defendant knows or should know of other risks not contemplated by the regulation. Restatement (Second) of Torts, § 288C.

[29]

**Negligence**

↔Premises Liability

**Negligence**

↔Premises liability

Compliance of a landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations may be evidence in any cause of action against the landowner for negligence or unreasonable use of the landowner’s land if the injury complained of is the sort the regulations were intended to prevent; such compliance, however, does not give rise to a presumption that the landowner acted reasonably or without negligence or liability to others in his or her extraction and removal activities.

2 Cases that cite this headnote

[30]

**Negligence**

↔Act of God

An “act of God” is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected; in contrast, that which reasonable human foresight, pains, and care should have prevented can not be called an act of God.

**Water Law**

↔Compensatory damages

When a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event and in no way fairly attributable to the defendant's conduct, the defendant is liable only for the damages that are fairly attributable to the defendant's conduct; however, in such a case, a defendant has the burden to show by clear and convincing evidence the character and measure of damages that are not the defendant's responsibility, and if the defendant cannot do so, then the defendant bears the entire liability.

[31]

**Negligence**

↔Natural and probable consequences

**Negligence**

↔Foreseeability

One is answerable for the ordinary and proximate consequences of his negligence, and this liability includes all those consequences which may have arisen from the neglect to make provision for dangers which ordinary skill and foresight are bound to anticipate.

[32]

**Negligence**

↔Act of God

No negligence liability attaches to any one for damages sustained by reason of the acts of God and the forces of nature, but a party whose wrongful acts co-operate with, augment, or accelerate those forces, to the injury of another, is liable in damages therefor.

**\*\*867 \*538 Syllabus by the Court**

1. "Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact." Syllabus Point 2, in part, *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989).

2. In determining whether a landowner acted reasonably in dealing with surface water pursuant to the "reasonable use" rule set forth in Syllabus Point 2 of *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989), a jury generally should consider all relevant circumstances, including such factors as amount of harm caused, foreseeability of harm on the part of the landowner making alteration in the flow of surface waters, the purpose or motive with which the landowner acted, etc.

3. "In the matters of negligence, liability attaches to a wrongdoer ... because of a breach of duty which results in an injury to others." Syllabus Point 2, in part, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

[33]

**Negligence**

↔Act of God

For an act of God to constitute a valid defense and exonerate one from a claim for damages, it must have been the sole cause, and not just a contributing cause of the injuries or damages sustained.

[34]

**Water Law**

↔Rights, duties, and liabilities in general

**Water Law**

↔Evidence

4. "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man [or woman] in the defendant's position, knowing what he [or she] knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" Syllabus Point 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).
5. "The right of a riparian proprietor to have the water of the stream pass his [or her] land in its natural flow is a right annexed to the soil and exists as parcel of the land." Syllabus Point 2, *Roberts v. Martin*, 72 W.Va. 92, 77 S.E. 535 (1913).
6. "A diversion of a natural water course, though without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage." Syllabus Point 1, *Roberts v. Martin*, 72 W.Va. 92, 77 S.E. 535 (1913).
7. "The right of a riparian owner to the natural flow of the stream is not dependent upon its value to him [or her] or the use which he [or she] makes of it." Syllabus Point 3, *Roberts v. Martin*, 72 W.Va. 92, 77 S.E. 535 (1913).
8. "The obstruction or the diversion of a natural watercourse which restricts the natural flow of the water of the stream and causes such water to overflow, accumulate and stand upon the land through which such watercourse passes is an infringement of a property right of the landowner and imports damage to such land." Syllabus Point 3, *McCausland v. Jarrell*, 136 W.Va. 569, 68 S.E.2d 729 (1951).
9. Compliance of a landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations may be evidence in any cause of action against the landowner for negligence or unreasonable use of the landowner's land if the injury complained of was the sort the regulations were intended to prevent. Such compliance, however, does not give rise to a presumption that the landowner acted reasonably or without negligence or liability to others in his or her extraction and removal activities.
10. Where a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event and in no way fairly attributable to the defendant's conduct, the defendant is liable only for the damages that

are fairly attributable to the defendant's conduct. However, in such a case, a defendant has the burden to show by clear and convincing evidence the character and measure of damages that are not the defendant's responsibility; and if the defendant cannot do so, then the defendant bears the entire liability. To the extent that our prior cases such as *State ex rel. Summers v. Sims*, 142 W.Va. 640, 97 S.E.2d 295 (1957); *Riddle v. Baltimore & O.R. Co.*, 137 W.Va. 733, 73 S.E.2d 793 (1952), and others similarly situated held differently, they are hereby modified.

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## Opinion

MAYNARD, Chief Justice.

In this case, we answer several certified questions from the Flood Litigation Panel in regards to lawsuits arising from July 8, 2001, floods in several counties in southern West Virginia.<sup>1</sup>

### I.

## FACTS

On July 8, 2001, several heavy rainstorms passed over southern West Virginia and areas of Boone, Fayette, Kanawha, McDowell, Mercer, Raleigh, and Wyoming counties were flooded. These floods caused property damage, personal injury, and death.

Subsequently, 489 plaintiffs,<sup>2</sup> who are private residential property owners and occupiers, filed actions in the above counties against 78 different defendants including coal companies, timbering companies, landowners, lessors, railroads, and gas companies. Several of the defendants were involved in various ways in the extraction and removal of natural resources such as coal, oil, and timber, which altered or disturbed the natural state of the land. Plaintiffs allege in their complaints that Defendants should be responsible for damage to personal property and real estate, personal injury, and wrongful death upon various theories of liability including strict liability; unreasonable use of land; negligence; interference with riparian rights; and nuisance.

Pursuant to an administrative order of this Court dated May 16, 2002, then Chief Justice Robin Davis referred the July 8, 2001, flood \*\*869 \*540 cases to the Flood Litigation Panel for determination.<sup>3</sup> The Panel thereafter held hearings and decided that the watersheds and Plaintiffs involved have different factual patterns but all of the cases have common issues of law. By order entered on August 1, 2003, the Panel certified nine questions to this Court which we decided should be reviewed and consequently docketed for hearing.<sup>4</sup> In its certification order, the Panel indicated that it certified these questions pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure, in that it arises from a motion for judgment on the pleadings; W.Va.Code § 58-5-2 (1998); and *Bass v.*

*Coltelli*, 192 W.Va. 516, 453 S.E.2d 350 (1994).<sup>5</sup>

Our review of the questions certified by the Flood Litigation Panel leads us to conclude, with the exception discussed *infra*, that they are proper for certification. As noted above, the questions arise from a motion for judgment on the pleadings. The provisions of W.Va.Code § 58-5-2 (1998), specifically authorize certification of any question of law arising from such a motion. Also, we find that there is a sufficiently precise and undisputed factual record on which the legal issues can be determined, and that these legal issues substantially control the case. *Bass v. Coltelli*, 192 W.Va. 516, 453 S.E.2d 350 (1994). Accordingly, we now proceed to address the questions certified.

### II.

## STANDARD OF REVIEW

<sup>111</sup> As a preliminary matter, we note that “[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

### III.

## DISCUSSION

The first question and its subsections certified to this Court and the Flood Panel’s \*\*870 \*541 answers are as follows:<sup>6</sup>

1. Whether the plaintiffs have a cognizable cause of action based on allegations of unreasonable use of land under the balancing test set forth in *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989).

Answer of the Flood Panel: Yes.

- 1a. In the reasonable use test, may the plaintiffs’ balancing test include such intangibles as the right to peaceful enjoyment of land, undetermined value and the particular value a [person’s] home holds

for him [or her]?

Answer of the Flood Panel: Yes.

1b. May the defendants' test include such things under the social utility as possession of electricity, heat, and other needs of the populations generally?

Answer of the Flood Panel: Yes.

<sup>121</sup> Appellees and Defendants herein assert that the Panel is correct in concluding that Appellants and Plaintiffs can state a cognizable cause of action for unreasonable use under *Morris*. However, Defendants assert that *Morris* applies only to claims for diversion of surface waters onto *adjoining* landowners' property. Defendants reason that foreseeability is presumed when the other landowner is adjoining, whereas the same is not true when the other landowners are not adjoining. For their part, Plaintiffs are unhappy with the question as formulated, urge this Court to acknowledge that there is no practical or legal difference between the rules in *Morris* and *Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989), and adopt Section 833 of the Restatement (Second) of Torts as well as the "compensation test" for unreasonableness found in Section 826(b) of the Restatement.

First, we reject Defendant's argument that *Morris* applies only to diversion of surface waters onto *adjoining* landowners' property. As we discuss *infra*, one of the factors to be considered in determining reasonableness is foreseeability that harm will result from the use. We believe that to adopt an inflexible rule that a defendant cannot be held liable to nonadjacent landowners under the *Morris* reasonableness test may unfairly prevent recovery in some instances where the harm to non-adjacent landowners caused by the defendant was foreseeable due to the specific topography of the land. Thus, the better rule is to permit non-adjacent landowners to bring an action under *Morris* with the question of reasonableness best left to the jury. Accordingly, we reformulate certified question number 1 as follows,<sup>7</sup>

Whether adjacent and non-adjacent plaintiffs have a cognizable cause of action based on allegations of unreasonable use of land under the balancing test set forth in *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989).

Accordingly, we now proceed to answer question 1 as reformulated.

<sup>131</sup> <sup>141</sup> We conclude that Plaintiffs have a cause of action under *Morris v. Priddy*. In *Morris*, the plaintiffs filed a complaint against the defendant alleging that the flooding that damaged their property was caused by the fill the defendant had placed on his property. This Court

discussed at length the development of our law with regard to a landowner's liability for altering the surface of his or her land to change the course or amount of surface water that flows off the land onto an adjoining landowner's property. After rejecting the civil rule which, we explained, rests on the maxim, "So use your own property or right that you do not injure \*\*871 \*542 another," *Morris*, 181 W.Va. at 590, 383 S.E.2d at 772, and the common law rule, which allows "each owner to fight surface water as he chooses," *id.*, citing *Jordan v. City of Benwood*, 42 W.Va. 312, 315, 26 S.E. 266, 267 (1896), we settled on a new rule, set forth in Syllabus Point 2, which provides, in part:

Generally, under the rule of reasonable use, the landowner, in dealing with surface water,<sup>8</sup> is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact.

(Footnote added). In adopting this rule from the Connecticut Supreme Court case of *Page Motor Co., Inc. v. Baker*, 182 Conn. 484, 438 A.2d 739 (1980), we reasoned:

An increasing number of courts have come to the conclusion that both the civil and the common law rules, even as modified, are too inflexible to meet the demands of an urban society. The development of land for commercial, industrial, and housing complexes requires alteration of the property. If this is to occur, an owner must be able to take reasonable steps to develop property without being subjected to suit. In the development of property that is not entirely level, there is generally a need for artificial drainage to handle surface waters and, by reasonably using such devices, liability should not necessarily result.

*Morris*, 181 W.Va. at 591, 383 S.E.2d at 773. The Panel

below presumed as true in its certification order that Defendants' disturbance of the land caused an increase in the peak flow of surface water onto the properties of Plaintiffs. Therefore, we believe that our rule in *Morris* is applicable to the facts of this case. Accordingly, we answer question one, as reformulated, in the affirmative.

<sup>15</sup> As noted above, the Flood Panel certified two subsections to question one and also answered these in the affirmative. However, due to the fact-specific inquiry demanded of a jury in deciding the question of reasonableness, we do not find it desirable to delineate with specificity all of the factors to be considered when determining the issue of reasonableness. Therefore, we decline to answer questions 1.a. and 1.b. Rather, after surveying the tests for reasonableness utilized in other jurisdictions, we hold that in determining whether a landowner has acted reasonably in dealing with surface water pursuant to the "reasonable use" rule set forth in Syllabus Point 2 of *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989), the jury generally should consider all relevant circumstances, including such factors as amount of harm caused, foreseeability of harm on part of landowner making alteration in the flow of surface waters, the purpose or motive with which the landowner acted, etc. See, e.g., *Collins v. Wickland*, 251 Minn. 419, 88 N.W.2d 83 (Minn.1958); *Keys v. Romley*, 64 Cal.2d 396, 412 P.2d 529, 50 Cal.Rptr. 273 (1966); and *Rick v. Worden*, 369 N.W.2d 15 (Minn.Ct.App.1985). We now turn to certified question number 2.

The second question certified by the Flood Panel is:

Whether the plaintiffs have a cognizable cause of action upon allegations that the defendants' use of the land is a private nuisance and therefore actionable under the standards set forth in *Hendricks v. Stalaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989).

Answer of the Flood Panel: Yes.

Our review of the stipulated facts leads us to conclude that there is not a sufficiently precise and undisputed factual record on which the issue of whether Plaintiffs have a **\*\*872 \*543** cause of action for nuisance can be determined. Therefore, we do not answer the second certified question. However, because further development of the evidence below may indicate that Plaintiffs have such a cause of action, we find it necessary to briefly discuss our applicable law and the parties' arguments on this issue.

Defendants contend that the Panel incorrectly found that Plaintiffs have a cause of action for private nuisance. According to Defendants, *Hendricks* applies only when

the substantial interference with land is from something other than the diversion of surface water. Defendants base this assertion on the fact that this Court decided *Hendricks* four months prior to *Morris*, but declined to utilize *Hendricks*' private nuisance principles in *Morris*. Further, Defendants aver that under West Virginia law, a private nuisance is a *repeated* or *continuous* interference with another's use of land.

In *Hendricks*, the defendant dug a water well on his property. The plaintiff subsequently attempted to develop a septic system on property adjacent to the defendant's land. However, the Department of Health refused to issue a permit to the plaintiff because the septic system was too close to the defendant's water well. The plaintiff thereafter filed an action alleging that the defendant's well was a private nuisance. A jury returned a verdict in favor of the plaintiff. This Court reversed, and adopted a standard for bringing a private nuisance cause of action. This standard was set forth in Syllabus Points 1 and 2 of *Hendricks* as follows:

1. A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land.
2. An interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm.

<sup>16</sup> <sup>17</sup> According to Defendants, *Hendricks* applies only to cases that involve interference with land use for reasons other than surface water diversion. This is incorrect. The fact is that this Court in *Hendricks* did not discuss the issue of surface water diversion simply because that issue was not before us. In *Hendricks*, we defined a private nuisance to include "conduct that is intentional and unreasonable, negligent or reckless, or that results in an abnormally dangerous conditions or activities in an inappropriate place." *Hendricks*, 181 W.Va. at 33-34, 380 S.E.2d at 200 (citations omitted). There is nothing in this broad and inclusive definition that necessarily excludes a cause of action in nuisance for surface water diversion. Further, contrary to Defendants' assertions, nothing in our law limits a private nuisance to repeated or continuous interference with another's use of land. Finally, in Syllabus Point 2 of *Mahoney v. Walter*, 157 W.Va. 882, 205 S.E.2d 692 (1974), this Court held:

As a general rule, a fair test as to whether a business or a particular use of a property in connection with the operation of the business constitutes a nuisance, is the

reasonableness or unreasonableness of the operation or use in relation to the particular locality and under all the existing circumstances.

Again, we are unable to conclude on the stipulated facts before us whether Plaintiffs have a cause of action for nuisance. Therefore, as the evidence is further developed below, the Panel and any trial court should apply the applicable law to the facts in order to decide whether a cause of action for nuisance lies in this case.

<sup>18]</sup> The second question we address is,

Whether the plaintiffs have a cognizable cause of action upon the allegation that the defendants were negligent in the use of their land and therefore answerable under the classic theory of negligence.

Answer of the Flood Panel: Yes.

<sup>19]</sup> <sup>10]</sup> Plaintiffs and Defendants concur that Plaintiffs have a cause of action for negligence. This Court agrees. We have held that, “[i]n matters of negligence, liability attaches to a wrongdoer ... because of a breach of duty which results in injury to others.” Syllabus Point 2, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988). Further,

**\*\*873 \*544** The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man [or woman] in the defendant’s position, knowing what he [or she] knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Syllabus Point 3, *Sewell, supra*. This Court is aware of no reason why Plaintiffs should be foreclosed from the opportunity to prove that Defendants’ breach of a duty caused or contributed to their injuries. Accordingly, we answer question number 3 in the affirmative.

The third question to be considered inquires,

Whether Plaintiffs have a cognizable cause of action upon the allegation that the operation of extracting and removing natural resources is an abnormally dangerous activity and whether Defendants are strictly liable to Plaintiffs for any damages caused by their activities.

Answer of the Flood Panel: No.

<sup>11]</sup> Plaintiffs aver that this question is based on an issue not before the Flood Panel. Rather, say Plaintiffs, their position is not that the extraction of natural resources, by its very nature, constitutes an abnormally dangerous activity, but that certain activities of Defendants in the course of extracting resources produce ancillary conditions that are unreasonably dangerous where the risk of flash flooding is concerned. In other words, say Plaintiffs, the alteration of the mountainous topography in southern West Virginia, which is the result of extraction of coal and timber, causes an abnormally high risk of flash flooding which should make Defendants strictly liable for damages. Thus, Plaintiffs seek to distinguish the *activity* of extracting natural resources from the *conditions* resulting from that activity. Defendants respond that their activities do not create a high risk of flooding and that any risk can be eliminated by the exercise of due care. They further assert that their activities should not be considered abnormally dangerous because they are common, appropriate where they are carried on, and their value is not outweighed by their dangerous characteristics. Based on these arguments, we reformulate this question as follows:

Whether the plaintiffs have a cognizable cause of action upon the allegation that the operation of extracting and removing natural resources is an abnormally dangerous activity or that such activity produces ancillary conditions that create an unreasonably high risk of flash flooding so that the defendants are strictly liable to the plaintiffs for any damages caused by these activities.

In *Peneschi v. National Steel Corp. v. Koppers Co., Inc.*, 170 W.Va. 511, 295 S.E.2d 1 (1982), this Court adopted into the common law of this State *Fletcher v. Rylands*, 3 H. & C. 774, 159 Eng.Rep. 737 (1865), *rev’d Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff’d Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), as articulated in the *Restatement (Second) of Torts* (1976). “The basic principle of *Rylands* is that where a person chooses to use an abnormally dangerous instrumentality he is strictly liable without a showing of negligence for any injury proximately caused by that instrumentality.” *Peneschi*, 170 W.Va. at 515, 295 S.E.2d at 5. “The ‘rule’ of *Rylands* is that ‘the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place

where it is maintained, in light of the character of that place and its surroundings.’ ” *Id.*, quoting W. Prosser, *Law of Torts*, 508 (4th ed.1971).

The conditions and activities to which the rule has been applied have followed the English pattern. They include water collected in quantity in a dangerous place, or allowed to percolate; explosives or inflammable liquids stored in quantity in the midst of a city; blasting; pile driving; crop dusting; the fumigation of a party of a building with cyanide gas; drilling oil wells or operating refineries in thickly settled communities; an excavation letting in the sea; factories emitting smoke, dust or noxious gases in the midst of a town; roofs so constructed as to shed snow into a highway; and a dangerous party wall.

On the other hand the conditions and activities to which the American courts \*\*874 \*545 have refused to apply *Rylands v. Fletcher*, whether they purport to accept or to reject the case in principle, have been with few exceptions what the English courts would regard as a “natural” use of land, and not within the rule at all. They include water in household pipes, the tank of a humidity system, or authorized utility mains; gas in a meter, electric wiring in a machine shop, and gasoline in a filling station; a dam in the natural bed of a stream; ordinary steam boilers; an ordinary fire in a factory; an automobile; Bermuda grass on a railroad right of way; a small quantity of dynamite kept for sale in a Texas hardware store; barnyard spray in a farmhouse; a division fence; the wall of a house left standing after a fire; coal mining operations regarded as usual and normal; vibrations from ordinary building construction; earth moving operations in grading a hillside; the construction of a railroad tunnel; and even a runaway horse.

W. Page Keeton, *et al.*, *The Law of Torts* § 78, 549-551 (5th ed.1984) (footnotes omitted and footnote added).

According to *Restatement (Second) of the Law of Torts* § 519 (1977),

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Further, § 520 of the *Restatement* indicates,

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

When we apply these factors to the facts before us, we find that Defendants are not strictly liable for their activities or the conditions their activities create. This Court simply does not believe that the day to day activities of Defendants necessarily create a high risk of flash flooding. Also, we are convinced that any increased risk of flooding which results from Defendant’s extractive activities can be greatly reduced by the exercise of due care. In addition, extractive activities such as coal mining and timbering are common activities in southern West Virginia. Finally, we are unable to conclude that the great economic value of some of these extractive activities, such as coal mining, is outweighed by their dangerous attributes. Accordingly, we answer question 4, as reformulated, in the negative.

The fourth question is,

Whether the plaintiffs have a cognizable cause of action based on interference with riparian rights.

Answer of the Flood Panel: Yes.

<sup>[12]</sup> Plaintiffs offer an alternative question to conform to their argument that this State’s riparian rights law should be simplified by recognizing that interference with riparian rights is no different from any other nuisance claim.<sup>10</sup> Defendants assert that \*\*875 \*546 Plaintiffs cannot state a cognizable cause of action for riparian rights because they do not claim that they are unable to access waters on their property.

<sup>[13]</sup> <sup>[14]</sup> <sup>[15]</sup> <sup>[16]</sup> <sup>[17]</sup> <sup>[18]</sup> <sup>[19]</sup> <sup>[20]</sup> We use our power to reformulate certified question number 4 as follows:

Do those plaintiffs herein who are riparian owners, by virtue of the fact that they own property adjacent to a stream or through which a stream flows, have a cognizable cause of action for interference with riparian rights based on the fact that the stream's natural flow was increased by a flood or the water of the stream overflowed and stood upon the riparian owner's land?

In answering this question, we start with the definition of "[a] riparian right [as] "[t]he right of a landowner whose property borders on a body of water or watercourse ... to make reasonable use of the water." *Black's Law Dictionary* 1352 (8th ed.2004). Under our law,

The riparian owner has a property interest in the flow of a natural watercourse through or adjacent to his [or her] property.

The right of enjoying this flow without disturbance, interference, or material diminution by any other proprietor is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself without molestation from his neighbors. The right of property is in the right to use the flow, and not in the specific water.

The riparian owner's right is to have the water pass his land in its natural course. Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality or detain it so as to deprive other proprietors or the public of a fair and reasonable participation in its benefits. The obstruction or diversion of the natural watercourse or the introduction into it of sediment, sludge, refuse or other materials which corrupt the quality of the water by upper riparian owners or users constitutes an infringement of the lower riparian owner's property right, which may be enjoined or give rise to a cause of action for damages.

*Snyder v. Callaghan*, 168 W.Va. 265, 271-272, 284 S.E.2d 241, 246 (1981) (internal quotations and citations omitted). We have recognized that "[t]he right of a riparian proprietor to have the water of a stream pass his land in its natural flow is a right annexed to the soil and exists as a parcel of the land." Syllabus Point 2, *Roberts v. Martin*, 72 W.Va. 92, 77 S.E. 535 (1913). In addition, "[a] diversion of a natural water course, though without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage." Syllabus Point 1, *id.*

Further, "[t]he right of a riparian owner to the natural flow of the stream is not dependent upon its value to him or the use which he makes of it." Syllabus Point 3, *id.* Finally,

The obstruction or the diversion of a natural watercourse which restricts the natural flow of the water of the stream and causes such water to overflow, accumulate and stand upon the land through which such watercourse passes is an infringement of a property right of the landowner and imports damage to such land.

Syllabus Point 3, *McCausland v. Jarrell*, 136 W.Va. 569, 68 S.E.2d 729 (1951).

The facts below indicate that the July 8, 2001, floods impacted, to varying degrees, portions of the Coal River, Lower New River, Middle New River, Tug River, Upper Guyandotte River, and Upper Valley Watershed and the sub-watersheds within them. We find that Plaintiffs below whose property borders on a stream or river that is located in the watersheds or sub-watersheds listed above and that flooded on July 8, 2001, have a cognizable cause of action for interference with riparian rights. This is due to the fact that these riparian owners have a right to the natural flow of a stream running adjacent to or through their property and a substantial \*\*876 \*547 increase in the natural flow, such as occurs during a flood, is an infringement of that right. In addition, those plaintiffs who are riparian owners have claims for damages caused by stream overflows that flooded their land. Therefore, we answer certified question 5, as reformulated by this Court, in the affirmative."

The fifth question we address asks,

In the event that a landowner conducts the extraction and removal of natural resources on its property in conformity with federal law and with permits issued by appropriate federal agencies, is any state court action preempted for damages caused by surface waters accumulating and migrating on residential property?

Answer of Flood Panel: No.

Plaintiffs and Defendants herein agree with the Flood Panel.

[21] [22] [23] [24] [25] [26] As a general rule, "preemption is disfavored in the absence of convincing evidence warranting its application." *Hartley Marine Corp. v.*

*Mierke*, 196 W.Va. 669, 673, 474 S.E.2d 599, 603 (1996). “As a result, there is a strong presumption that Congress does not intend to preempt areas of traditional state regulation.” *Chevy Chase Bank v. McCamant*, 204 W.Va. 295, 300, 512 S.E.2d 217, 222 (1998) (citation omitted). Congressional intent to preempt state law may be either express or implied. *See Chevy Chase Bank*, 204 W.Va. at 300, 512 S.E.2d at 222 (congressional intent “may be manifested by express language in a federal statute or implicit in the structure and purpose of the statute” (citation omitted)). “To establish a case of express preemption requires proof that Congress, through specific language, preempted the specific field covered by state law.... To prevail on a claim of implied preemption, ‘evidence of a congressional intent to pre-empt the specific field covered by state law’ must be pinpointed.” *Hartley*, 196 W.Va. at 674, 474 S.E.2d at 604 (citation omitted). There are two types of implied preemption which are field preemption and conflict preemption.

[F]ield pre-emption[ ] [occurs] where the scheme of federal regulation is “ ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ ” and conflict pre-emption[ ] [occurs] where “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]”

*Id.*, citing *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992).

The parties herein have not cited to us nor are we aware of express language in a federal statute that preempts state causes of action for damages under the specific facts of this case. In addition, we are unable to pinpoint any evidence of congressional intent to preempt such an action. Finally, it is clear that Congress left ample room for state regulation of the extraction and removal of natural resources like that involved herein in light of such state legislation as the *Surface Coal Mining and Reclamation Act*, W.Va.Code §§ 22-3-1 to 22-3-19. Therefore, we conclude that federal law does not preempt Plaintiffs’ claims below. Accordingly, we answer certified question number 6 in the negative.

The sixth question is,

In the event that a landowner conducts the extraction and removal of natural resources on its property in conformity with state law and with permits issued by appropriate state agencies, does this vitiate any cause of action for negligence, nuisance or unreasonableness?

Answer of Flood Panel: Yes.

Plaintiffs apparently read this question to mean that Defendants’ conformity with State law provides absolute immunity from suit, which they vehemently deny. Defendants assert that conformity to State law “certainly \*\*877 \*548 mitigates” against any causes of action stated by Plaintiffs. Because of the ambiguity in the question as framed by the Flood Panel as well as in the parties’ discussion of the issue, we reformulate the question as follows:

Is compliance of a landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations competent evidence in any cause of action against the landowner for negligence or unreasonable use of the landowner’s land if the injury complained of was the sort the regulations were intended to prevent?

<sup>[27]</sup> <sup>[28]</sup> <sup>[29]</sup> This Court has held that,

Failure to comply with a fire code or similar set of regulations constitutes *prima facie* negligence, if an injury proximately flows from the non-compliance and the injury is of the sort the regulation was intended to prevent; on the other hand, compliance with the appropriate regulations is competent evidence of due care, but does not constitute due care *per se* or create a presumption of due care.

Syllabus Point 1, *Miller v. Warren*, 182 W.Va. 560, 390 S.E.2d 207 (1990). Our holding is based on the rationale that,

If the defendants knew or should have known of some risk that would be prevented by reasonable measures not required by the regulation, they were negligent if they did not take such measures. It is settled law that a statute or regulation merely sets a floor of due care. *Restatement (Second) of*

*Torts*, § 288C (1965); *Prosser and Keaton on Torts*, 233 (5th ed.1984). Circumstances may require greater care, if a defendant knows or should know of other risks not contemplated by the regulation.

*Id.*, 182 W.Va. at 562, 390 S.E.2d at 209. We find that the above-stated rule and its underlying rationale are applicable in this case. Therefore, we hold that compliance of a landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations may be evidence in any cause of action against the landowner for negligence or unreasonable use of the landowner's land if the injury complained of is the sort the regulations were intended to prevent. Such compliance, however, does not give rise to a presumption that the landowner acted reasonably or without negligence or liability to others in his or her extraction and removal activities. Accordingly, we answer question 6 in the affirmative.

This brings us to the final two questions certified which are as follows:

Whether the causation shall be limited to those matters proximately caused by the increase in peak flow (the increase in the flow of water that was caused by the extraction and removal of natural resources over the flow that would have normally occurred during the rain event) by the defendants' use of the land.

Answer of the Flood Panel: Yes.

Whether the measure of damages should be limited to those damages proximately cause[d] by the increase in peak flow (the increase in the flow of water that was caused by the extraction and removal of natural resources over the flow that would have normally occurred during the rain event) due to defendants' activities on the land.

Answer of the Flood Panel: Yes.

This Court reformulates these questions into a single question as follows:

Where a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event

and in no way fairly attributable to the defendant's conduct, then is the defendant liable only for the damages that are fairly attributable to the defendant's conduct?

[30] [31] [32] [33] In their arguments on this issue, the parties discussed the "Act of God" defense. Concerning this Court's law in regards to the Act of God defense, we have recognized that "[a]n 'Act of God' is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected." *State ex rel. Summers v. Sims*, 142 W.Va. 640, 645, 97 S.E.2d 295, 299 (1957). \*\*878 \*549 In contrast, "[t]hat which reasonable human foresight, pains, and care should have prevented can not be called an act of God." Syllabus Point 2, *Atkinson v. Chesapeake & O. Ry. Co.*, 74 W.Va. 633, 82 S.E. 502 (1914). Thus, "[o]ne is answerable for the ordinary and proximate consequences of his negligence, and this liability includes all those consequences which may have arisen from the neglect to make provision for dangers which ordinary skill and foresight are bound to anticipate." Syllabus Point 1, *Adkins v. City of Hinton*, 149 W.Va. 613, 142 S.E.2d 889 (1965). "No liability attaches to any one for damages sustained by reason of the acts of God and the forces of nature, but a party whose wrongful acts co-operate with, augment, or accelerate those forces, to the injury of another, is liable in damages therefor." Syllabus Point 1, *Williams v. Columbus Producing Co.*, 80 W.Va. 683, 93 S.E. 809 (1917). In other words, "[f]or an act of God to constitute a valid defense and exonerate one from a claim for damages, it must have been the sole cause, and not just a contributing cause of the injuries or damages sustained." Syllabus Point 3, *Adkins v. City of Hinton*, *supra*.

The above-stated law has been applied in a number of our flood cases. See *Atkinson v. Chesapeake & O. Ry. Co.*, *supra* (upholding judgment against defendant for diverting water from its natural course and flooding plaintiff's land and rejecting defendant's claim that extraordinary rain constituted an act of God); *Williams v. Columbus Producing Co.*, *supra* (ruling that defendant's construction of oil rig and tanks in creek bed was negligence which contributed to, if it did not cause, flood which caused flood damage to plaintiff's property for which defendant is liable); *Riddle v. Baltimore & O.R. Co.*, 137 W.Va. 733, 747, 73 S.E.2d 793, 801 (1952) (affirming judgment against defendant railroad company for flood damages to plaintiff's property as result of inadequacy of defendant's culvert and stating that "even if the flood ... was unprecedented and of such character as to constitute an act of God, the defendant cannot effectively

defend this action on that basis, for the reason that the inadequacy of its culvert was a contributing proximate cause of plaintiff's damages" (citation omitted)); *State ex rel. Summers v. Sims*, 142 W.Va. at 645, 97 S.E.2d at 299 (awarding writ to compel State Auditor to issue warrants for payment out of Legislative appropriation for flood damages caused by negligent construction and maintenance of highway bridge and recognizing that "[f]or an 'Act of God' to exonerate one from a claim for damages, it must have been the sole cause, and not just a contributing cause of the injuries or damages sustained" (citations omitted)); and *Adkins v. City of Hinton*, *supra* (affirming judgment against city for flood damages where a heavy rainfall and a mass of debris from a negligently maintained dump damaged property).

Our research indicates that several courts have followed the rule recognized in 112 A.L.R. 1084, 1085 which states:

In the majority of the cases involving the flooding of lands in which it appeared that part of the waters doing the damage complained of were the result of an act of God and part were the result of defendant's negligent or wrongful acts, it has been held that defendant was liable only for the proportionate amount of the damage caused by the waters attributable to his [or her] fault.

*See e.g., Republican Valley R. Co. v. Fink*, 18 Neb. 89, 24 N.W. 691, 693 (1885) (approving the jury instruction that "if you believe from the evidence that the defendant negligently constructed its line of road, bridges, and culverts, as complained of by the plaintiff in her petition, and such negligence contributed in large degree, along with the act of God, in causing the loss sustained by the plaintiff, it would be liable in damages for the additional damages sustained by the plaintiff by reason of any such negligence of the defendant"); *Wilson v. Hagins*, 116 Tex. 538, 545, 295 S.W. 922, 924 (1927) (where it was alleged that defendant erected embankment and ditch which diverted creek onto lands of plaintiff, court indicated that recovery should be limited to damages caused by diverted water); *Mark Downs, Inc. v. McCormick Properties, Inc.*, 51 Md.App. 171, 188, 441 A.2d 1119, 1129 (1982) (stating that "[w]here God and man collaborate in causing flood damage, man must pay at least for his share of the blame" (citations omitted)).

**\*\*879 \*550** The defendants argue that the principle set

forth in 112 A.L.R. 1084, *supra*, seeks to ensure an equitable result where an unusual and unforeseeable rainfall event combines with a defendant's actionable conduct to cause flood damage. We appreciate the equitable force of this argument.

On the other hand, the plaintiffs argue that even in such a case, the discrete portions and types of damage attributable to a defendant as a practical matter may well be so difficult to precisely calculate that a defendant may unfairly escape liability-if a heavy burden is placed on a plaintiff to show that portion or character of damage that is truly unforeseeable and not fairly attributable to the defendants. The plaintiffs point out that our longstanding law has therefore eschewed the notion of turning cases where a defendant has failed to properly manage and control rainfall leaving their property into nit-picking contests about how much damage a plaintiff "would have suffered anyway" if the defendant had acted properly. We also appreciate the equitable force of this argument.

<sup>[34]</sup> Accordingly, we hold that where a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event and in no way fairly attributable to the defendant's conduct, the defendant is liable only for the damages that are fairly attributable to the defendant's conduct. However, in such a case, a defendant has the burden to show by clear and convincing evidence the character and measure of damages that are not the defendant's responsibility; and if the defendant cannot do so, then the defendant bears the entire liability. To the extent that our prior cases, such as *State ex rel. Summers v. Sims*, 142 W.Va. 640, 97 S.E.2d 295 (1957); *Riddle v. Baltimore & O.R. Co.*, 137 W.Va. 733, 73 S.E.2d 793 (1952), and others similarly situated held differently, they are hereby modified. Accordingly and subject to these qualifications, we answer certified question number 7, as reformulated, in the affirmative.

#### IV.

#### CONCLUSION

For the foregoing reasons, we answer the reformulated certified questions as follows:

1. Whether adjacent and non-adjacent plaintiffs have a

cognizable cause of action based on allegations of unreasonable use of land under the balancing test set forth in *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989).

Answer: Yes.

2. Whether the plaintiffs have a cognizable cause of action upon the allegation that the defendants were negligent in the use of their land and therefore answerable under the classic theory of negligence.

Answer: Yes.

3. Whether the plaintiffs have a cognizable cause of action upon the allegation that the operation of extracting and removing natural resources is an abnormally dangerous activity or that such activity produces ancillary conditions that create an unreasonably high risk of flash flooding so that the defendants are strictly liable to the plaintiffs for any damages caused by these activities.

Answer: No.

4. Do those plaintiffs herein who are riparian owners, by virtue of the fact that they own property adjacent to a stream or through which a stream flows, have a cognizable cause of action for interference with riparian rights based on the fact that the stream's natural flow was increased by a flood or the water of the stream overflowed and stood upon the riparian owner's land?

Answer: Yes.

5. In the event that a landowner conducts the extraction and removal of natural resources on its property in conformity with federal law and with permits issued by appropriate federal agencies, is any state court action preempted for damages caused by surface waters accumulating and migrating on residential property?

#### Footnotes

- <sup>1</sup> We wish to acknowledge the contribution of amici curiae who filed briefs in this case. West Virginia Forestry Association; West Virginia Coal Association; West Virginia Oil and Natural Gas Association; West Virginia Farm Bureau; West Virginia Land and Mineral Owners Council; West Virginia Woodland Owners Association; West Virginia Economic Development Council; West Virginia Business and Industry Council; West Virginia Roundtable; West Virginia Chamber of Commerce; and Sierra Club.
- <sup>2</sup> While the certification order indicates that there are 489 plaintiffs, the brief of the plaintiffs asserts that "some 3,500 plaintiffs have joined in the lawsuit claiming a non-trespassory interference with their use and enjoyment of their property by the defendants' use of defendants' property."
- <sup>3</sup> The Chief Justice of this Court originally received a motion, filed in the Circuit Court of Fayette County in *Sandra Blake, et al. v. Bluestone Coal Corporation, et al.*, Civil Action No. 01-C-221-H, pursuant to Rule 26.01 of the West Virginia Trial Court Rules, to refer to the Mass Litigation Panel certain litigation pending before seven circuit courts. This motion was referred to the

Answer: No.

6. Is compliance of a landowner in the extraction and removal of natural resources \*\*880 \*551 on his or her property with the appropriate state and federal regulations evidence in any cause of action against the landowner for negligence or unreasonable use of the landowner's land if the injury complained of was the sort the regulations were intended to prevent?

Answer: Yes.

7. Where a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event and in no way fairly attributable to the defendant's conduct, then is the defendant liable only for the damages that are fairly attributable to the defendant's conduct?

Answer: Yes.

Certified questions answered.

Justice MCGRAW, deeming himself disqualified, did not participate in the decision in this case.

Judge CLAWGES, sitting by temporary assignment.

#### Parallel Citations

607 S.E.2d 863, 167 Oil & Gas Rep. 120

Honorable Gary L. Johnson, Judge of the Twenty-Eighth Judicial Circuit as a member of the Mass Litigation Panel, for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer. Judge Johnson essentially concluded that the issues raised in the flood litigation cases could be more efficiently and fairly resolved by referral to the Mass Litigation Panel. By order of May 16, 2002, the Chief Justice granted the motion to refer as recommended by Judge Johnson.

4 In its certification order, the Panel explained that for the purposes of the motion for judgment on the pleadings and the motion for certification, it assumed as true the following:

1. The rain event that occurred on July 8, 2001, was of an unusual nature causing a great deal of rain in the watersheds in issue.
2. Several of the defendants were involved in various ways in the extraction and removal of natural resources (coal, oil and timber) which altered or disturbed the natural state of the land in the various watersheds.
3. This disturbance of the land has caused an increase in the peak flow of surface water onto the properties of the plaintiffs causing personal injury, injury to property (real and personal) and wrongful death.
4. In most cases the removal and extraction of natural resources was done under permits issued by state and federal agencies and conformed with the requirements of the permits.
5. The damages suffered by the plaintiffs were more severe due to the disturbance of the land.

5 According to Rule of Civil Procedure 12(c),

*Motion for judgment on the pleadings.* -After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

W.Va.Code § 58-5-2 concerns certification to this Court and provides, in part, that “[a]ny question of law, including ... a motion for judgment on the pleadings ... may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision [.]” Finally, in Syllabus Point 3 of *Bass v. Coltelli*, 192 W.Va. 516, 453 S.E.2d 350 (1994), this Court held that “[q]uestions subject to certification ... are limited to any question arising upon ... [*inter alia*] a challenge of the sufficiency of a pleading.”

6 The Flood Panel certified nine questions. Plaintiffs allege in their brief that the Panel erred in not certifying Plaintiffs’ 31 proposed questions. After reviewing these proposed questions, we find no merit to Plaintiffs’ claim. Instead, we believe that the questions certified by the Panel as reformulated by this Court are sufficient to control the relevant issues that will arise below.

7 This Court has held,

When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W.Va.Code*, 51-1A-1, *et seq.* and *W.Va.Code*, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.

Syllabus Point 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

8 In Syllabus Point 2, in part, of *Neal v. Ohio River R.R. Co.*, 47 W.Va. 316, 34 S.E. 914 (1899), we defined “surface water” as, water of casual, vagrant character, oozing through the soil, or diffusing and squandering over or under the surface, which, though usually and naturally flowing in known direction, has no banks or channel cut in the soil; coming from rain and snow, and occasional outbursts in time of freshet, descending from mountains or hills, and inundating the country; and the moisture of wet, spongy, springy, or boggy land.

9 *But see, contra*, Syllabus Point 5 of *Bowers v. Wurzburg*, 207 W.Va. 28, 528 S.E.2d 475 (1999), in which we held that “[t]he storage, sale, or distribution of gasoline is subject to the same analysis, as expressed in Restatement (Second) of Torts §§ 519 and 520 (1976), that we would apply to any other activity involving similar or greater danger to the public.”

10 Specifically, Plaintiffs offer the following alternative question:

Does West Virginia recognize a cause of action for interference with riparian rights where such interference is either (a) a nuisance under §§ 821A-831 of the *Restatement (Second) of Torts*; or (b) is unreasonable under § 850A of the *Restatement (Second)*?

In light of our reformulation of the certified question and our answer thereto, we decline to address Plaintiffs’ recommended question.

11 We agree with Defendants’ assertion that to the extent the riparian rights doctrine applies to Plaintiffs, the standard for liability is reasonable use. This Court held in Syllabus Point 4 of *Roberts v. Martin, supra*, that “[t]he right of a lower riparian owner to the natural flow of the stream is subject only to a reasonable use of the water by the upper riparian owners as it runs through their lands

before reaching his [or hers].”

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**CERTIFICATE OF SERVICE**

Elizabeth Bettridge, being first duly sworn on oath, deposes and states:

That on the 19<sup>th</sup> day of June, 2013, she caused to be sent a copy of Respondent's Appellate Brief; and this Certificate of Service to the below listed party of record in the above-captioned matter, as follows:

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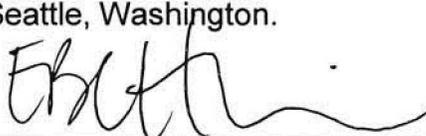
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DATED this 19<sup>th</sup> day of June, 2013 at Seattle, Washington.

  
Elizabeth Bettridge

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